89-186

No. _____

In The

Supreme Court of the United States

October Term, 1989

COMMUNITY ELECTRIC SERVICE OF LOS ANGELES, INC.

Petitioner,

vs.

NATIONAL ELECTRICAL CONTRACTORS ASSOCIATION, INC., et. al.

Respondents.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

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QUESTIONS PRESENTED

1. Does Federal Rule of Civil Procedure 17(b) require a federal court to adopt a state rule of corporate capacity when to do so permits antitrust violators to use their own illegal conduct to shield them from Sherman Act liability, frustrating the basic enforcement goals of the antitrust laws?

2. Can a state law rule that comes into play because of the illegal antitrust conduct challenged in the lawsuit operate to deprive a favored litigant of its constitutional right of access to federal court?

3. Is the statute of limitations on a Sherman Act claim tolled while an issue basic to the dispute is the subject of proceedings before the National Labor Relations Board?

LIST OF PARTIES

The following parties to the proceeding in the court whose judgment is sought to be reviewed, in addition to those listed in the caption, are listed below:

IBEW-NECA Pension Trust Fund

Southern Sierras Chapter, NECA

John Gomes

Industrial Elec., Inc.

Dennis Thorson

Thorson Elec., Inc.

International Brotherhood of Electrical Workers, AFL-CIO

IBEW, Local Union 11

IBEW, Local Union 440

Los Angeles County Chapter, NECA

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vs.

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Respondents.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

Petitioner, Community Electric Service of Los Angeles, Inc., respectfully prays that a writ of certiorari issue to review the judgment and opinion of the United States Court of Appeals for the Ninth Circuit entered in this proceeding on March 6, 1989, as amended April 27, 1989 and as corrected by minute order filed May 10, 1989.

On April 27, 1989 the Ninth Circuit denied the timely filed Petition for Rehearing filed by Community Electric Service of Los Angeles, Inc.

OPINIONS BELOW

The Opinion of the Court of Appeals is reported at 869 F.2d 1235. The original slip opinion appears as Appendix A hereto. The Court's amended opinion appears as Appendix B. The order denying the petition for rehearing appears as Appendix C. The May 10 order correcting the amended opinion appears as Appendix D.

JURISDICTION

Petitioner brought this action in the United States District Court for the Central District of California invoking that court's jurisdiction pursuant to 28 U.S.C. section 1331. Upon the district court's granting of summary judgment, the Court of Appeals had jurisdiction over petitioner's appeal pursuant to 28 U.S.C. section 1291.

This Court's jurisdiction is invoked pursuant to 28 U.S.C. section 1254(1).

STATUTORY AND CONSTITUTIONAL PROVISIONS INVOLVED

Article VI of the United States Constitution provides in relevant part:

> "This Constitution, and the Laws of the United States which shall be made in pursuance thereof . . . shall be the supreme Law of the Land . . . any Thing in the Constitution or Laws of any State to the Contrary notwithstanding."

The Fifth Amendment of the United States Constitution provides in relevant part:

"No person shall . . . be deprived of life, liberty, or property, without due process of law. . . ."

Section One of the Fourteenth Amendment of the United States Constitution provides in relevant part:

"No State shall . . . deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws."

15 U.S.C. section 1 provides in relevant part:

"Every contract, combination in the form of trust or otherwise, or conspiracy, in restraint of trade or commerce among the several States, or with foreign nations, is declared to be illegal."

15 U.S.C. section 15 provides in relevant part:

"[A]ny person who shall be injured in his business or property by reason of anything forbidden in the antitrust laws may sue therefor in any district court of the United States in the district in which the defendant resides or is found or has an agent, without respect to the amount in controversy, and shall recover threefold the damages by him sustained, and the cost of suit, including a reasonable attorney's fee."

Federal Rule of Civil Procedure 17(b) provides in relevant part:

"The capacity of a corporation to sue or be sued shall be determined by the law under which it was organized."

California Revenue and Taxation Code section 23301 provides as follows:

"Except for the purposes of filing an application for exempt status or amending the articles of incorporation as necessary either to perfect that application or

to set forth a new name, the corporate powers, rights and privileges of a domestic taxpayer, may be suspended . . . [for failure to pay specified taxes.]"

STATEMENT OF THE CASE

Community Electric Service of Los Angeles, Inc. ("CES") was incorporated in California in 1976. It successfully conducted business in Los Angeles County as an electrical contracting firm until driven out of business.

In 1981 CES sought to expand its market out of the immediate Los Angeles metropolitan area to the Palm Springs desert where major construction efforts were underway. In order to do so, CES signed a letter of assent, binding it to the then-existing Inside Wireman's Agreement between the International Brotherhood of Electrical Workers (IBEW) Local 440 and the Southern Sierras Chapter of the National Electrical Contractors Association (NECA), the management organization for electrical contractors. As CES was soon to experience firsthand, the terms of that agreement operated as a barrier to entry, unfairly burdening CES and other businesses new to the jurisdiction in plain violation of federal antitrust law. (See Appendix E [Affidavit of Donald L. Martin].) The local NECA chapter, in concert with the local IBEW, both of their parent bodies, their Los Angeles County counterparts, indigenous electrical contractors, and a union-management trust fund acted to restrain trade, which in the end drove CES not only out of the Palm Springs electrical contracting market but completely out of business.

As the direct result of the collusive labor agreement and the varied efforts to enforce it, CES was unable to

meet its financial responsibilities, including those to the Internal Revenue Service and (what would ultimately prove to be even more fatal) those to the California Franchise Tax Board. On May 6, 1983, CES was forced to cease its operations when the IRS seized its assets. Shortly thereafter, unbeknownst to CES, its California corporate powers were suspended for nonpayment of state taxes.

On January 13, 1986, CES timely filed this action in the United States District Court for the Central District of California, seeking damages and equitable relief under the Sherman Act, and naming as defendants each of the conspiring entities and individuals that had run it out of business. On June 8, 1987, almost a year and a half after the lawsuit began, defendants sought a status conference on CES's capacity to sue, based on the fact that at the time the case had been filed CES's corporate powers were under suspension. Upon learning of the suspension CES took immediate action to gain reinstatement.[1] Nonetheless, on August 6, 1987, the district court granted summary judgment for defendants and terminated the action, looking to California law to determine CES's capacity to sue (Fed. R. Civ. P. 17(b).) The district court relied on a

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[1] On June 8, 1987, CES's corporate powers were reinstated, pursuant to California Revenue and Taxation Code section 23305b which provides for reinstatement without full payment of back taxes. California revived CES's corporate powers specifically so that CES could prosecute this lawsuit. Because California has reinstated CES's corporate powers to bring this lawsuit, and has a lien on the proceeds of the action, the state has a strong interest in allowing CES to continue to pursue this case.

California court of appeal decision holding that the subsequent revivor of a suspended corporation is ineffective to validate retroactively a timely filed complaint. *Welco Construction, Inc. v. Modulux, Inc.*, 47 Cal.App.3d 69, 120 Cal.Rptr. 572 (1975). By applying *Welco*, the district court applied California law so as to cut off CES's substantial federal right.

CES appealed, but the Court of Appeals for the Ninth Circuit affirmed, holding that: "[Federal Rule of Civil Procedure] Rule 17(b) prevails over antitrust law and requires us to apply California law [i.e. on corporate capacity]." *Community Electric Service of Los Angeles, Inc. v. National Contractors Association, Inc.*, 869 F.2d 1235, 1239 (9th Cir. 1989).

REASONS FOR GRANTING REVIEW

I.

THE COURT OF APPEALS' CONSTRUCTION OF RULE 17(b) – IN CONFLICT WITH THE DECISIONS OF OTHER CIRCUITS – PERMITS STATE RULES OF PROCEDURE TO FRUSTRATE THE SUBSTANTIVE POLICY OF THE SHERMAN ACT OR, INDEED, ANY OTHER FEDERAL LAW. THE SUPREMACY CLAUSE AND THE SUBSTANTIVE GOALS OF ANTITRUST LAW PRECLUDE SUCH A CONSTRUCTION OF RULE 17(b).

Rule 17(b) states federal courts should look to state law to determine a party's capacity to sue. In those instances when federal jurisdiction rests on diversity, application of the forum state's rules promotes fairness. See *Woods v. Interstate Realty Co.*, 337 U.S. 535, 538 (1949);

Angel v. Bullington, 330 U.S. 183 (1947). There is no reason why a litigant who chooses to bring a state law action in federal court should thereby gain any greater benefit or be treated differently than if the case were instead filed in state court. But this logic does not apply when the basis of the action is federal – not state – law. In federally based actions, blind deference to state capacity rules would permit state law to close the door to the federal courthouse, thereby defeating the substantive policies of federal law, as in this case.

"[F]ederal courts must be ever vigilant to insure that application of state law poses 'no significant threat to any identifiable federal policy or interest. . . .' " *Burks v. Lasker*, 441 U.S. 471, 479 (1979), quoting *Wallis v. Pan American Petroleum Corp.*, 384 U.S. 63, 68 (1966). Federal courts must reject "aberrant" or "hostile" state laws to assure that state-made law does not destroy the federal right. *Burks v. Lasker, supra*, 441 U.S. at 479-80. Federal courts should not follow – much less create – a state law rule that jeopardizes more important federal rights.

The antitrust violations that CES challenged in this lawsuit rendered CES unable to pay its franchise taxes, resulting in its lack of capacity to sue under state law. By adopting the California law of corporate capacity expressed in the *Welco* opinion, the Court of Appeals, in essence, has allowed defendants' illegal antitrust activity to shield them from all liability to their victim. This result is completely at odds with clear congressional intent that victims of anticompetitive conduct be able to pursue federal remedies in a federal forum. 15 U.S.C. § 15; see *Blumenstock Bros. v. Curtis Pub. Co.*, 252 U.S. 436, 440

(1920) [federal courts have exclusive jurisdiction to enforce the antitrust laws].

Congress intended its antitrust legislation to be given maximum scope so as to advance national goals of paramount import. Thus Congress extended "the substantive prohibition of the Sherman Act to the farthest reaches of its power under the Commerce Clause, thereby mandating for this nation a competitive business economy to the full extent that [it] could . . . under its constitutional power to regulate interstate and foreign commerce." *Gough v. Rossmoor Corp.*, 487 F.2d 373, 375-376 (9th Cir. 1973). Congress enabled those business entities injured by illegal antitrust activity to pursue private actions because this is a primary means of advancing these national goals. *Hawaii v. Standard Oil Co.*, 405 U.S. 251, 262 (1972) ["In enacting these laws, Congress had many means at its disposal to penalize violators. . . . (but) chose to permit all persons to sue to recover three times their actual damages every time they were injured . . . by an antitrust violation. . . . (thereby) encourag(ing) these persons to serve as 'private attorneys general.' "].

"The antitrust laws are an expression of federal public policy to foster free competition. The treble-damage action was designed to implement that policy by encouraging private suitors to enforce the antitrust laws and thereby to deter potential violators from undertaking the forbidden conduct." *Mulvey v. Samuel Goldwyn Productions*, 433 F.2d 1073, 1075 (9th Cir. 1970), *cert. denied*, 402 U.S. 923 (1971). Maintenance of an antitrust suit can never be made to hinge on the availability of a state or common-law remedy. *Id.* The California rule adopted by the district court and sanctioned on appeal frustrates

these paramount congressional goals by rewarding those antitrust violators who are the most successful in their anticompetitive conduct – those who put the competition completely out of business – by permitting them to evade all liability for their illegal acts. Rule 17(b) does not permit, much less require this result.

Federal Rule of Civil Procedure 17(b) directs federal courts to look to state law in order to determine whether a particular party has the capacity to sue or defend a lawsuit. It is far from certain that the Rule was intended to be applied at all in a federal question lawsuit. Leading commentators on the Federal Rules appear to treat Rule 17(b)'s directive as applying only in those actions brought under a federal court's diversity powers. 6 Wright & Miller, *Federal Practice and Procedure*, § 1561, p. 735 (1971) ["Of course, if subject matter jurisdiction is not based upon diversity of citizenship, the federal court need not apply forum state restrictions on a corporation's ability to sue."]; 3*A Moore's Federal Practice*, § 17.21, p. 17-174 (2d ed. 1989) ["Where the relevant substantive law is federal . . . the state statute should not be applicable."]. These authorities correctly criticize adopting state corporate capacity definitions that operate to defeat a federal claim.

There is no question that "[c]onsiderations of state law may be displaced where their application," as here, "would be inconsistent with the federal policy underlying the cause of action under consideration." *Johnson v. Railway Express Agency*, 421 U.S. 454, 465 (1975). This well-defined principle has been applied in the specific context of Rule 17(b) to disregard a state capacity law that deprived prisoners (who under then-existent state law lacked capacity to sue throughout their imprisonment) of

the ability to pursue civil rights claims. *Weller v. Dickson*, 314 F.2d 598, 601 (9th Cir. 1963), *cert. denied*, 375 U.S. 845 (1963), approving of *McCollum v. Mayfield*, 130 F.Supp. 112, 116 (N.D. Cal. 1955) ["a literal application of Rule 17(b) . . . would bring about an artificial and erroneous result. Such a provision cannot be applied mechanically to every case. . . .(T)he logical corollary of defendants' argument (that plaintiff lacked capacity to sue during his imprisonment) is that if plaintiff were imprisoned for life, his remedy for the alleged invasion of his federally protected constitutional rights would be completely lost through the operation of a local statute."]; see also *Almond v. Kent*, 459 F.2d 200, 202 (4th Cir. 1972) and cases cited therein; *Beishir v. Swenson*, 331 F.Supp. 1224, 1226 (W.D. Mo. 1970); *Wilson v. Garnett*, 332 F.Supp. 888, 890 (W.D. Mo. 1970).

As these cases illustrate, Rule 17(b) cannot be construed to require a federal court to mechanically adopt a state capacity law which is in fundamental conflict with the substantive purpose of the federal litigation at issue. Indeed in a similar context, this Court has held that a state law that limited a prisoner's ability to seek federal *habeas corpus* relief could not interfere with the plain congressional intent that prisoners be able to freely pursue "the Great Writ." *Johnson v. Avery*, 393 U.S. 483, 485 (1969). By contrast, because the Louisiana law at issue in *Robertson v. Wegmann*, 436 U.S. 584, 588 (1978) was not inconsistent with the fundamental purpose of the Civil Rights Act of 1871, this Court found no fatal conflict between that state's legislative scheme for survival of actions and the advancement of civil rights. Although under Louisiana law the decedent's civil rights claim

abated because he was not survived by any heirs entitled under the survivorship statute to pursue his claim, the statutory scheme was not infirm because it was not generally inhospitable to the survival of 42 U.S.C. section 1983 actions nor did it have some other independent adverse effect upon the policies underlying the civil rights laws. *Id.*

Because it was not raised by the facts of that case, *Robertson* highlighted but did not reach the crucial issue CES raises here – whether a state law that completely eviscerates the underlying purpose of the plaintiff's federal claim can be countenanced in a case where the exact "deprivation of federal rights" being sued for also undermined the plaintiff's ability to sue. *Robertson*, 436 U.S. at 594. This question – whether a federal remedy can be utterly defeated by a state law that comes into play only because of the substantive violation of federal law – was answered in *Guyton v. Phillips*, 532 F.Supp. 1154 (N.D. Cal. 1981), disapproved on other grounds in *Peraza v. Delamater*, 722 F.2d 1455, 1457 (9th Cir. 1984). In that case the district court refused to limit an estate to those damages available under California law (which precluded recovery for pain and suffering in a wrongful death suit) precisely because the police conduct that violated Guyton's civil rights also caused his death, i.e., police officers shot him at close range in the back of the head. Denying the estate recovery for pain and suffering "would strike at the very heart of a § 1983 action." *Guyton*, 532 F.Supp. at 1166.

Applying California's restrictive corporate capacity rule where the antitrust violation caused the incapacity in the first place impermissibly frustrates federal antitrust policy. Federal courts must be ever vigilant to see that a

defendant does not benefit from the illegal conduct that caused the plaintiff's "disability" (see *Crawford v. United States*, 796 F.2d 924, 926 (7th Cir. 1986); *Clifford by Clifford v. United States*, 738 F.2d 977, 979 (8th Cir. 1984). Rule 17(b) cannot be construed to permit defendants to evade antitrust liability simply because their anticompetitive conduct was so successful.

II.

A STATE LAW THAT BARS A CLASS OF LITIGANTS FROM SEEKING A FEDERAL REMEDY FOR VIOLATION OF THEIR FEDERAL RIGHTS OFFENDS ESSENTIAL PRINCIPLES OF DUE PROCESS.

The *Welco* rule applied in this case to defeat petitioner's antitrust claim is a door-closing law that violates due process by depriving petitioner of its right of access to the federal courts, its only avenue of redress for violation of the Sherman Act. A potential litigant's right of access to the courts must be jealously guarded against "denial by particular laws that operate to jeopardize it for particular individuals." *Boddie v. Connecticut*, 401 U.S. 371, 379-380 (1971); *NAACP v. Button*, 371 U.S. 415 (1963); *Bell v. City of Milwaukee*, 746 F.2d 1205, 1262 (7th Cir. 1984). "The right of access to the courts is substantive rather than procedural. Its exercise can be shaped and guided by the state [citation], but cannot be obstructed, regardless of the procedural means applied." *Moreilo v. James*, 810 F.2d 344, 346-347 (2d Cir. 1987). Even though a state statute furthers some important state interest, it will be found to be constitutionally infirm if in application it deprives a litigant of the right to have its matter heard.

NAACP v. Button, supra, 371 U.S. at 439; *Boddie v. Connecticut,* 401 U.S. at 379-380.

This principle has been held to prevail even though the state's power to legislate to protect its own legitimate interest is beyond question. Thus, for example, although regulating "barratry, maintenance and champerty" was a laudable goal, this Court held that laws passed under the guise of prohibiting lawyers from soliciting clients that in practice foreclosed the NAACP from seeking named plaintiffs for lawsuits brought as a means of ending racial discrimination were unconstitutional as applied. *NAACP v. Button,* 371 U.S. at 439.

A federal court must balance the state's asserted interest in its law against the subject matter of the intended litigation to determine whether the state purpose is sufficiently important to override the constitutionally-protected right of the litigant to have its matter heard. Applying this balancing test, Connecticut's interest in assessing fees sufficient to recoup the costs of processing divorces had to give way to the plainly more important interest of an indigent's ability to secure a divorce. *Boddie v. Connecticut,* 401 U.S. at 380-381. Of course, whenever the litigation in question is brought not just for private gain but as a means to advance the public good, courts must accord even greater weight to the constitutionally protected right to sue. See *NAACP v. Button,* 371 U.S. at 429 [for the NAACP "litigation is not a technique of resolving private differences; it is a means

for achieving the lawful objectives of equality of treatment. . . ."].

The lack of capacity that sounded the death knell for CES's Sherman Act claims came about because the corporation could not pay its taxes as a result of defendants' anticompetitive conduct. California's only purpose in suspending CES's corporate powers was a practical one – to collect the taxes due it.[2] This California interest is fundamentally no different from Connecticut's desire to offset the cost of processing divorces. Even if this interest were opposed to prosecution of this lawsuit if it were in the state courts, it could not close the doors to the federal courthouse. In reality, California's interest in tax collection is furthered in the same way the policy of the Sherman Act is furthered – by affording CES its constitutional right of access to the federal courts.

The right of access to the courts is fundamental. Rule 17(b) cannot be construed, and state law cannot be applied, to deny this right.

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[2] While the federal interest in private antitrust enforcement is only advanced if CES is allowed to pursue its case, that is also true of the state's only interest, tax collection (see *Peacock Hill Ass'n v. Peacock Lagoon Constr. Co.*, 8 Cal.3d 369, 371 (1972)). The State of California has a lien on the proceeds of CES's suit and can look forward to recovering the back taxes only if the lawsuit proceeds.

III.

THE COURT OF APPEALS' FAILURE TO FIND THE STATUTE OF LIMITATIONS TO BE TOLLED BY PENDING NLRB PROCEEDINGS UNDERMINES THE PRIMARY JURISDICTION OF SPECIALIZED AGENCIES, FRUSTRATES ANTITRUST POLICY AND INVITES NEEDLESS WASTE OF SCARCE JUDICIAL RESOURCES.

Local 440 brought proceedings before the NLRB to establish the subsistence provisions of the Inside Wireman's Agreement as a mandatory subject of bargaining. CES defended, inter alia, on the grounds the agreement was in violation of the antitrust laws. The Administrative Law Judge ruled in favor of CES.[3] Defendants appealed. The NLRB held the challenged provisions were enforceable, but declined to reach the antitrust issues. (CR 86, Exhibit D.)

At least one Court of Appeals has held that a determination whether conduct is a subject of mandatory collective bargaining is essential to invocation of the labor exemption to the antitrust laws. *Mackey v. National Football League*, 543 F.2d 606, 614 (8th Cir. 1976), *cert. dismissed*, 434 U.S. 801 (1977). And the NLRB has primary jurisdiction over this issue. 29 U.S.C. section 158(d).

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[3] The Administrative Law Judge concluded, "While the antitrust implications of these contract clauses appear to be deserving of serious consideration . . . I shall dismiss this case for failure of . . . counsel . . . to demonstrate that subsistence pay is a mandatory subject of bargaining, or that its purpose is other than to attempt to place a substantial roadblock in the path of employers who may wish to bid on jobs within the geographical jurisdiction of the Union." (CR 86, Exhibit C.)

In the instant case, the Court of Appeals held the antitrust statute of limitations was not tolled by the NLRB proceedings because "prior resort to the Board was not a prerequisite to review in federal court." 869 F.2d at 1241. This crabbed construction of tolling principles is inconsistent with this Court's holding in *Ricci v. Chicago Mercantile Exchange*, 409 U.S. 289 (1973), and undermines both the primary jurisdiction of the NLRB and the policies of the antitrust laws. It also invites wastefully duplicative proceedings.

In many respects this case parallels *Ricci*. There, the antitrust claim involved factual issues and questions about the scope, meaning and significance of rules of the Commodity Exchange Commission. This Court affirmed a stay of judicial action pending administrative proceedings, rejecting the position advocated by the dissenters, which sounds very much like the opinion of the Court of Appeals in this case.

It is true here, as it was in *Ricci*, that the administrative agency did not have exclusive authority to determine whether the challenged conduct was exempt from the antitrust laws or, if not exempt, in violation of them. Nevertheless, here, as there, the agency's determination of issues within its jurisdiction would "be of great help to the antitrust court in arriving at the essential accommodation between the antitrust and the regulatory regimes. . . ." 409 U.S. at 307.

Given the NLRB's primary jurisdiction over an issue basic to the antitrust dispute, common sense and public policy require a tolling of the statute of limitations. *Id.*;

see also *United States v. Western Pacific Railroad*, 352 U.S. 59, 64 (1956).

CONCLUSION

We respectfully submit that a writ of certiorari should issue and the judgment and decision of the Ninth Circuit Court of Appeals should be reversed.

Respectfully submitted,

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By Alan G. Martin

APPENDIX A

FOR PUBLICATION

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

COMMUNITY ELECTRIC SERVICE OF LOS ANGELES, INC.,
Plaintiff-Appellant-Cross-Appellee,

v.

NATIONAL ELECTRICAL CONTRACTORS ASSOCIATION, INC., ET AL.,
Defendants-Appellees-Cross-Appellants.

Nos. 87-6280; 88-5616; 88-5663

D.C. No. CV-86-0254-RSWL

OPINION

Appeal from the United States District Court
for the Central District of California
Ronald S.W. Lew, District Judge, Presiding

Argued and Submitted
November 4, 1988 – Pasadena, California

Filed March 6, 1989

Before: Eugene A. Wright, William A. Norris and Charles Wiggins, Circuit Judges.

Opinion by Judge Wright; Concurrence by Judge Wiggins

SUMMARY

Corporations and Business Organizations/Antitrust

The court affirmed the district court's granting of a motion for summary judgment, holding that a suspended

corporation did not have the capacity to sue, and that denial of sanctions against plaintiff was proper.

Appellant Community Electric Service of Los Angeles, Inc. (CES), a contractor, sued appellee National Electrical Contractors Association, Inc. (NECA), a trade union, for antitrust and RICO violations. Prior to filing, the Franchise Tax Board suspended CES's corporate powers, rights and privileges. A certificate of revivor was issued, reinstating CES. The district court dismissed the case, holding that CES lacked capacity to sue at the time the complaint was filed, and that the reinstatement was ineffective to validate the filing. The antitrust statute of limitations expired before the reinstatement. The defendants moved for Rule 11 sanctions, which were denied. CES contends that federal antitrust law should control its capacity to sue because of the federal interest involved.

[1] F.R.Civ.P. 17(b) provides that a corporation's capacity to sue or be sued is determined by the law under which it was organized. [2] Rule 17(b) prevails over antitrust law and requires the application of California law. [3] Under California law, CES had no capacity to sue at the time it filed the complaint. [4] Where the revivor issues after the statute of limitations has expired, California courts have held that corporate reinstatement will not validate retroactively the earlier filing. [5] NLRB proceedings did not toll the limitations period because resort to the Board was not a prerequisite to seeking relief in federal court. [6] There was no evidence that the district court erred in denying Rule 11 sanctions.

Concurring in part I of the opinion and in the judgment affirming the district court, Judge Wiggins adds that

the district court should be affirmed on the sanctions issue because the motion under Rule 11 came too late to serve its intended purpose.

COUNSEL

Pamela Victorine, Beverly Hills, California; John P. McNicholas, Los Angeles, California, for the plaintiff-appellant-cross-appellee, Community Electric Service.

D. William Heine, Los Angeles, California; Gary L. Lieber, Washington, D.C.; Jack R. White, Los Angeles, California, for the defendants-appellees-cross-appellants, National Electrical Contractors Association.

OPINION

WRIGHT, Circuit Judge:

This case involves the consolidation of three appeals from an antitrust suit with nine defendants. We must determine whether Community Electric Service, Inc. had the capacity to sue in federal court and whether its pleadings warrant Rule 11 sanctions.

FACTS

Community Electric, an electrical contracting company operating in Los Angeles County, bid successfully on a Palm Springs contract in an effort to expand its business geographically. It signed a letter of assent binding it to a collective bargaining agreement between the International Brotherhood of Electrical Workers (IBEW)

Local 440 and Southern Sierras National Electrical Contractor's Association, Inc. (NECA).

The IBEW Local 440 – Southern Sierras NECA agreement (termed "the Inside Wiremans' Agreement") has a provision effectively imposing a $55 per day travel/subsistence payment on non-local contractors for each employee on a job. It applies to jobs begun before the contractor has maintained a permanent place of business within the jurisdiction for 90 days.

Community Electric contends vigorously that this provision has the purpose and effect of excluding non-local contractors. It claims that the provision sets prices and makes it impossible for non-local contractors to compete on equal footing with local contractors.

Community Electric attempted dispute resolution under the terms of the agreement. A labor management committee ruled against it unanimously.

These provisions were also the subject of proceedings before the National Labor Relations Board. It held the subsistence payments a mandatory subject of bargaining and enforceable, but declined to address the antitrust implications.

Community Electric asserts that its challenges resulted in retaliatory action. Besides claiming harassment from Southern Sierras NECA and Local 440, Community Electric alleges additional harassment from their Los Angeles counterparts. It contends that Los Angles NECA and Local 11, as well as the IBEW-NECA pension trust fund, enforced several rules discriminatorily.

On January 13, 1986, Community Electric filed a complaint alleging violations of the Sherman Act, the Racketeer Influenced and Corrupt Organizations Act (RICO), and related California state law claims. It named as defendants the Southern Sierras and Los Angeles County Chapters of the NECA, their parent body, National NECA, Locals 11 and 440 of the IBEW, their parent body, International IBEW, two owners of electrical contracting firms from Palm Springs, John Gomes and Dennis Thorsen [sic], and the Southern California IBEW-NECA Pension Trust Fund.

On July 1, 1983, before the filing, the California Franchise Tax Board had suspended Community Electric's corporate powers, rights, and privileges. The defendants in their answer alleged Community Electric's lack of capacity to sue.

On May 28, 1987, the California Secretary of State's Office informed the defendants that Community Electric's corporate powers, rights, and privileges were suspended. The defendants notified Community Electric and on June 8 filed a request for a status conference. That day, the California Tax Franchise Board issued a certificate of revivor reinstating Community Electric's corporate powers for the purpose of pursuing this litigation.

On August 6, 1987, the court dismissed the case, holding that Community Electric lacked the capacity to file a complaint in January 1986 due to the July 1983 suspension. It also determined that the reinstatement was ineffective to validate the January filing. The antitrust statute of limitation expired May 6, 1987, four years after

Community Electric ceased doing business. The June 8 reinstatement occurred too late.

After the dismissal, the defendants moved for Rule 11 sanctions. The court denied them, concluding that neither the complaint nor Community Electric's subsequent documents violated Rule 11's "Frivolousness Clause."

Community Electric appeals the grant of summary judgment and defendants appeal the denial of their Rule 11 motion.

DISCUSSION

I. *Time Barring of Community Electric's Claims*

A. Capacity to File Suit

[1] Federal Rule of Civil Procedure 17(b) provides that "[t]he capacity of a corporation to sue or be sued shall be determined by the law under which it was organized." Community Electric filed before the antitrust statute of limitation (15 U.S.C. § 15b (1982)) expired. The court held it had no capacity to sue under California law, the law of the state where it incorporated. Community Electric argues that federal antitrust law should prevail because of the federal interest involved.

[2] We hold that Rule 17(b) prevails over antitrust law and requires us to apply California law. In *Levin Metals Corp. v. Parr-Richmond Terminal Co.*, 817 F.2d 1448, 1451 (9th Cir. 1987), we rejected the argument that the Comprehensive Environmental Response Compensation Liability Act of 1980 (CERCLA) prevails over 17(b). The plaintiffs sued a corporation for claims arising after its

dissolution. *Id.* at 1449. As the plaintiffs in that case, Community Electric cites no authority in support of its position and other courts have held to the contrary. *See id.* at 1451.

We follow the other circuits that apply state law even when it requires dismissing an antitrust suit. *See Moore v. Matthew's Book Co.*, 597 F.2d 645, 646-47 (8th Cir. 1979); *R.V. McGinnis Theatres v. Video Indep. Theatres, Inc.*, 386 F.2d 592, 593-95 (10th Cir. 1967), *cert. denied*, 390 U.S. 1014 (1968). This follows since corporations are creatures of state law. *Cf. Cort v. Ash*, 422 U.S. 66, 84 (1975) ("Corporations are creatures of state law").

The facts of *R.V. McGinnis Theaters* parallel this case. 386 F.2d at 593-94. McGinnis sued for alleged antitrust violations. Oklahoma had revoked McGinnis' charter for failing to pay its corporate franchise tax. McGinnis relied on a later reinstatement.

The Tenth Circuit affirmed the lower court decision to dismiss. *Id.* at 594-95. The relevant statute permitted reinstatement only where payment of the tax occurs within a year of suspension and McGinnis had paid after the year expired. *Id.*

[3] Applying California law, Community Electric had no capacity to sue in January 1986. Section 23301 of the California Revenue and Tax Code provides that the Franchise Tax Board may suspend the rights, powers and privileges of a corporation for nonpayment of taxes.

A delinquent California corporation may neither bring suit nor defend a legal action, *E.g., Green v. Norman*, 309 P.2d 809, 812 (Cal. 1957). We have repeatedly

acknowledged this as the law of California. *See United States v. 2.61 Acres of Land, More or Less*, 791 F.2d 666, 668 (9th Cir. 1985) (reversing refusal to grant continuance in order to enable corporation to revive itself); *cf. In re Christian & Porter Aluminum Co.*, 584 F.2d 326, 331-32 (9th Cir. 1978) (appeal by 14 suspended California corporations dismissed). Because the Franchise Tax Board suspended Community Electric, it had no capacity to sue.

B. *Retroactive Effect of Corporate Revival*

The antitrust statute of limitation expired May 6, 1987. The Board reinstated Community Electric on June 8, 1987. Community Electric argues that this reinstatement gave it the capacity retroactively for the January filing.

We apply California law to determine whether Community Electric may obtain retroactively the capacity to sue. The California statutory scheme provides for suspension under § 23301 and revival under § 23305 or § 23305b. Community Electric was revived without paying its taxes under § 23305b. Section 23305a, which applies to revival under either §§ 23305 or 23305b, states: "[u]pon the issuance of such certificate by the Franchise Tax Board the taxpayer therein named shall become reinstated but *such reinstatement shall be without prejudice to any action, defense or right which has accrued by reason of the original suspension or forfeiture.*" (emphasis supplied).

[4] No California Supreme Court decision has addressed the situation where the revivor issues after the statute of limitation has expired. Every California court facing this question has held that corporate reinstatement will not validate retroactively the earlier filing. These

decisions conclude that the expiration of a statute of limitation qualifies as a "defense" that "has accrued."

Since we must apply California law and have no Supreme Court decision, we look to the decisions of the intermediate state courts of appeal. *See, e.g., Miller v. Fairchild Indus., Inc.*, 797 F.2d 727, 735 (9th Cir. 1986) (applying California law to breach of contract claims). We follow the decision of a state court of appeal unless convincing evidence exists that the state supreme court would decide the issue differently. *Id.*

The court below specifically relied on *Welco Constr., Inc. v. Modulux, Inc.*, 120 Cal. Rptr. 572, 573 (Ct. App.), *cert. denied*, 120 Cal. Rptr. 572 (1975). Welco had filed a complaint after suspension of its corporate status. Modulux answered, but did not challenge Welco's standing to prosecute until the day of trial. Welco obtained a certificate of revivor on that day. The trial court permitted Modulux to amend its answer to plead the statutes of limitations and granted a judgment of nonsuit.

The court of appeal affirmed, applying the language of § 23305a. *Id.* at 574-75. It concluded that prior California decisions distinguish a plea in abatement from a defense. Facts warranting a plea in abatement must exist at the time of the plea and corporate revivor will validate retroactively the acts abated. In contrast, a statute of limitations is a defense and the revivor will not validate a prior filing of suit. *Id.*

Recently another California district court of appeal reaffirmed the holding in *Welco* and the California Supreme Court denied review, as it had for *Welco*. *See ABA Recovery Serv., Inc. v. Konold*, 244 Cal. Rptr. 27, 30 (Ct.

App. 1988). Although *ABA Recovery* involved a separate statute of limitation, the court applied the *Welco* analysis and reached the same result. *See id.; accord Electronic Equipment Express, Inc. v. Donald H. Seiler & Co.*, 176 Cal. Rptr. 239, 245 (Ct. App. 1981) (revival of a corporation cannot prejudice a statute of limitations defense that accrues during suspension of its powers).

Community Electric says that *Welco* does not represent California law or does not apply to this suit. First, it argues that corporate revival validates retroactively all prior acts undertaken during periods of suspension, even after accrual of a defense. Second, it argues that *Welco* treats a statute of limitation as a meritorious defense incorrectly.

Community Electric provides no persuasive reason for treating the antitrust statute of limitation differently than those involved in *Welco* and *ABA Recovery*. Both cases dealt with the argument that corporate revival validates retroactively all prior acts undertaken during periods of suspension. Both rejected the argument, relying on *Traub Co. v. Coffee Break Serv., Inc.*, 57 Cal. Rptr. 846, 848 (1967). The court in *Traub* allowed a revivor to validate a judgment obtained during suspension, but distinguished *Cleveland v. Gore Bros., Inc.*, 58 P.2d 931 (Cal. Ct. App. 1936), as "present[ing] a statute of limitations problem." 57 Cal. Rptr. at 848.

Community Electric cites no authority that convinces us that the California Supreme Court has changed its position since *Traub*. This seems true where, as here, the Court had a recent opportunity to address the issue but avoided it. *See Tenneco West, Inc. v. Marathon Oil Co.*, 756

F.2d 769, 771 (9th Cir.), *cert. denied*, 474 U.S. 845 (1985) (intermediate appellate state court decision not to be disregarded, particularly where the highest court has refused to review).

We also disagree that *Welco* treats a statute of limitation as a meritorious defense incorrectly. Three court of appeal decisions have squarely held otherwise. *See ABA Recovery*, 244 Cal. Rptr. at 30; *Welco*, 120 Cal. Rptr. at 575; *Cleveland*, 58 P.2d at 932. *Welco* concluded that statutes of limitation are vital to the welfare of society, favored by the law, viewed as statutes of repose and as such constitute meritorious defenses. 120 Cal. Rptr. at 575 (quoting *Scheas v. Robertson*, 238 P.2d 982, 986 (Cal. 1951)). If California determines that the expiration of the statute bars a delinquent corporation's claim, we may not modify that conclusion.

C. *Equitable Tolling During NLRB Proceedings*

[5] Local 440 brought proceedings before the NLRB to establish the subsistence payments as a mandatory subject of bargaining. Involved were the same provisions challenged by Community Electric.

It asks us to extend the equitable tolling of *Mt. Hood Stages, Inc. v. Greyhound Corp.*, 616 F.2d 394 (9th Cir.), *cert. denied*, 449 U.S. 831 (1980), to this case. It argues that the NLRB proceedings tolled the antitrust statute of limitation because they may affect the applicability of the nonstatutory labor exemption from the antitrust laws.

We decline to make that extension. The equitable tolling of *Mt. Hood* rested on considerations of federal

policy and primary jurisdiction not present here. *See id.* at 403. Mt. Hood, a bus company, asked the Interstate Commerce Commission to modify its approval on acquisitions by Greyhound, a competitor. *Id.* at 395. Mt. Hood later filed an antitrust suit against Greyhound. Greyhound would have argued that the acquisitions were immune had Mt. Hood sued before the ICC made the modification requested. *See Mt. Hood Stages, Inc. v. Greyhound Corp.*, 555 F.2d 687, 688 (9th Cir. 1977), *vacated*, 437 U.S. 322 (1978).

We decided that the doctrine of primary jurisdiction provides the "relevant federal procedural law to guide the decision to toll the limitations period." 616 F.2d at 403. This follows because the court could issue no injunction and award no damages until the ICC exercised its primary jurisdiction. *Id.*

Here, the NLRB proceedings did not toll the limitations period since prior resort to the Board was not a prerequisite to review in federal court. *See, e.g., Nichols v. Hughes*, 721 F.2d 657, 660 (9th Cir. 1983) (period tolled if resort to administrative body is prerequisite to court's review). When considering the nonstatutory labor exemption, courts make the determination independently. *See, e.g., California Dump Truck Owners Ass'n, Inc. v. Associated Gen. Contractors of Am., Inc.*, 562 F.2d 607, 614 (9th Cir. 1977).

D. *Due Process Claim*

Community Electric argues that the suspension of its corporate powers without actual notice resulted in a taking of its property without due process. It raised the question below in two lines of a lengthy brief without

argument or citation to authority. Since the court never ruled on it and we have no developed record to review, we decline to address the question. We have discretion to determine what questions to consider and resolve for the first time on appeal. *See Singleton v. Wulff*, 428 U.S. 106, 120-21 (1976); *Quinn v. Robinson*, 783 F.2d 776, 814-15 (9th Cir.), *cert. denied*, 479 U.S. 882 (1988).

II. *The Rule 11 Motion*

A. *Standard of Review*

[6] The defendants challenge the court's denial of its Rule 11 motion. This court reviews *de novo* the legal conclusion whether specific conduct violated Rule 11. *E.g., Golden Eagle Distrib. Corp. v. Burroughs Corp.*, 801 F.2d 1531, 1538 (9th Cir. 1986). It reviews any factual determinations by the court under a clearly erroneous standard. *Id.*

B. *Timing of the Rule 11 Motion*

Community Electric's counsel argues that summary judgment applying the statute of limitation makes the Rule 11 motion untimely. In substance, he argues that the motion forces us to address the merits.

We may address the denial of sanctions without looking too deeply into the merits of the case. *See Lemos v. Fencl*, 828 F.2d 616, 618 (9th Cir. 1987) ("It is not necessary for us to resolve the underlying legal issue in order to review the sanction award because even a petition that is correctly dismissed on its merits will not necessarily warrant sanctions.").

Community Electric's counsel also contends, somewhat inconsistently, that the defendants filed a late motion for sanctions. He asserts that they should have made the request after each allegedly frivolous pleading or before judgment.

The timeliness of the Rule 11 motion rests within the judge's discretion. *See* Advisory Committee Note of 1983 to Amended Rule 11 ("The time when sanctions are to be imposed rests in the discretion of the trial judge."). The optimum timing of sanctions to further the deterrence aspect of Rule 11 depends on the circumstances. *In re Yagman*, 796 F.2d 1165, 1184 (9th Cir. 1986), *cert. denied*, 108 S. Ct. 450 (1987). This requires discretion.

Other circuits have approached the timeliness question differently. Several have analogized the request for Rule 11 sanctions with requests for attorneys fees or costs. *See Muthig v. Brant Point Nantucket, Inc.*, 838 F.2d 600, 604 (1st Cir. 1988) (referring to local rule on attorneys fees); *Szabo Food Serv., Inc. v. Canteen Corp.*, 823 F.2d 1073, 1079-80 (7th Cir. 1987) (local rule on costs and attorneys fees), *cert. dismissed*, 108 S. Ct. 1101 (1988).

The Third Circuit employs a more demanding approach that we decline to adopt. *See Mary Anne Pensiero, Inc. v. Lingle*, 847 F.2d 90, 99-100 (3d Cir. 1988) (motion required prior to entry of judgment). Although we agree with that court's concerns regarding early notification and the efficient use of judicial resources, *see Yagman*, 796 F.2d at 1184 (early notification of sanctionable behavior desirable), we believe these matters rest properly within the sound discretion of the trial judge.

The court below did not abuse its discretion. The defendants filed within 30 days of the entry of judgment, the time requires to request attorneys fees. *See* C.D. Cal. Ct. R. 16.10.

C. *Rule 11 Objective Standards*

The defendants contend that Community Electric filed several frivolous pleadings in violation of Fed. R. Civ. P. 11. The Rule states:

> The signature of an attorney or party constitutes a certificate by the signer that the signer has read the *pleading, motion,* or *other paper;* that to the best of the signer's knowledge, information and belief formed after reasonable inquiry *it* is well grounded in fact and is warranted by existing law or a good faith argument for the extension, modification or reversal of existing law . . . (emphasis supplied).

This language requires us to evaluate the pleading or paper filed as a whole. *See Zaldivar v. City of Los Angeles,* 780 F.2d 823, 831 (9th Cir. 1986) ("Rule 11 sanctions shall be assessed if *the paper* filed in district court and signed by an attorney . . . is frivolous, legally unreasonable, or without factual foundation. . . .") (emphasis supplied).

This court held recently that it would not impose sanctions even where a complaint contains false allegations. *Murphy v. Business Cards Tomorrow, Inc.,* 854 F.2d 1202, 1205 (9th Cir. 1988). Citing *Golden Eagle Distrib. Corp.,* 801 F.2d at 1540. We stated that Rule 11 permits sanctions only where the pleading as a whole is frivolous. 854 F.2d at 1205. *Accord Burull v. First Nat'l Bank,* 831 F.2d 788, 789-90 (8th Cir. 1987), *cert. denied,* 108 S. Ct. 1225 (1988) (several groundless claims did not make the pleading frivolous as a whole); *In re Ruben,* 825 F.2d 977, 987

(6th Cir. 1987) (same under 42 U.S.C. § 1988), *cert. denied*, 108 S. Ct. 1108 (1988).

We appeared to limit the "frivolous as a whole" standard in *Hudson v. Moore Business Forms, Inc.*, 836 F.2d 1156, 1163 (9th Cir. 1987). Hudson, an unemployed woman over 50, requested $4.2 million in an action alleging wrongful discharge and sex discrimination. *Id.* at 1162. We said that nothing in Rule 11 prevents "an independent analysis of the prayer for relief to determine whether it is frivolous and brought for an improper purpose." *Id.* 1163. *Hudson* does not control because its holding rested on the improper purpose of the plaintiff and the harassing nature of the complaint. *See id.* We make a different examination when a party complains that a litigant interposed a pleading for an improper purpose. An entire pleading has a harassing or improper purpose if the litigant included one of the claims or allegations with that purpose. This explains the independent analysis of the prayer for relief. *See id.* Here, the defendants do not allege improper purpose.

We apply an objective standard when evaluating the pleading as a whole. We evaluate also the attorney's conduct at the time of signing. *See, e.g., Cunningham v. County of Los Angles*, 859 F.2d 705, – (9th Cir. 1988). Rule 11 requires such examination into the facts and applicable law under the circumstances of the case. *Zaldivar*, 780 F.2d at 831. A court must impose sanctions if competent counsel could not form a reasonable belief that the pleading or other paper is warranted by existing law or a good faith argument for the extension, modification, or reversal of existing law. *Golden Eagle*, 801 F.2d at 1537. It follows that

sanctions are inappropriate where reasonable and competent attorneys could disagree over the existence of a good faith argument.

D. *Community Electric's Pleadings*

The defendants challenge three papers filed by Community Electric's counsel: (1) the complaint, (2) the opposition to summary judgment, and (3) the response to defendants' statement of uncontroverted facts.

1. *The Complaint and Opposition to Summary Judgment*

a. *Sherman Act Section 1 Claim*[1]

Community Electric claims that the provisions of the Inside Wiremans' Agreement violate section 1 of the Sherman Act. If reasonable and competent attorneys could disagree over the existence of a good faith argument, sanctions are inappropriate. *See Golden Eagle*, 801 F.2d at 1537.

Competent attorneys could make a good faith argument that the agreement constituted a *per se* violation of section 1. The Supreme Court has held certain economic practices so clearly anticompetitive that they are illegal *per se*. *See, e.g., Northern Pac. Ry. Co. v. United States*, 356 U.S. 1, 5 (1958). Price-fixing is such a practice. *Id.* The Court has said:

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[1] Since we conclude that the antitrust claims in Community Electric's complaint and its opposition to summary judgment were not frivolous, we need not address the other less significant claims contained in these documents. These pleadings as a whole were not frivolous.

> [A] combination formed for the purpose and with the effect of raising, depressing, fixing, pegging, or stabilizing the price of a commodity in interstate or foreign commerce is illegal per se.

United States v. Socony-Vacuum Oil Co., 310 U.S. 150, 223 (1940).

There could be a good faith argument that the collective bargaining agreement had the purpose and effect of stabilizing prices. In *National Elec. Contractors Ass'n v. National Constructors Ass'n*, 678 F.2d 492, 501 (4th Cir. 1982), *cert. dismissed*, 463 U.S. 1233 (1983), the IBEW and NECA agreed to include a provision in all IBEW construction contracts requiring the employer to contribute 1% of his gross labor payroll to the National Electrical Industry Fund. The court affirmed summary judgment finding price fixing because the provision interfered with the market forces that set the price of such contracts and robbed non-NECA contractors of a competitive advantage. *Id; compare T.W. Elec. Serv., Inc. v Pacific Elec. Contractors Ass'n*, 809 F.2d 626, 634-35 (9th Cir. 1987) (affirming summary judgment for defendants in suit involving similar provision due to insufficient evidence of conspiracy and injury to competition).

The travel/subsistence provision interferes with market forces and may stabilize the price that electrical contractors in Palm Springs charge. It permits local contractors to charge more for their contracts without the provision, knowing that non-local contractors must pay a higher rate to employees for the same services and will not successfully underprice them.

The defendants claim also that Community Electric's counsel had no objective basis to believe that the agreement injured competition. Such injury is an element of a section 1 violation under the rule of reason. *See Los Angeles Memorial Coliseum Comm'n v. National Football League*, 726 F.2d 1381, 1391 (9th Cir.), *cert. denied*, 469 U.S. 990 (1984). Community Electric's counsel provided the affidavit of a labor economist showing a good faith belief formed after reasonable inquiry as Rule 11 requires.

The defendants also assert that collateral estoppel after the NLRB proceeding made Community Electric's antitrust claim frivolous. They rely on the Administrative Law Judge's finding that the union (and the associated labor management committee) acted in good faith.

A finding of good faith in executing an agreement does not foreclose the possibility of an anticompetitive purpose. The inquiry regarding improper purpose is confined to a consideration of the impact of the agreement on competitive conditions. *National Soc'y of Professional Engineers v. United States*, 435 U.S. 679, 690 (1978).

The defendants contend finally that Community Electric's counsel had no good faith argument that the provisions do not fall within the nonstatutory labor exemption to the antitrust laws. This exemption prevents the antitrust laws from frustrating the goal of labor law, to permit employees to organize for the improvement of wages and working conditions. *E.g., Richards v. Nielson Freight Lines*, 810 F.2d 898, 905 (9th Cir. 1987). The defendants rely on the fact that the agreement concerns employee wages.

A union imposed restraint will fall outside the exemption if it produces significant anticompetitive

effects. *Id.; see Consolidated Express, Inc. v. New York Shipping Ass'n, Inc.*, 602 F.2d 494, 521 (3d Cir. 1979) (requiring that agreement restrain trade no more than necessary to advance a legitimate labor goal), *vacated on other grounds*, 448 U.S. 902 (1980).

A competent attorney could argue in good faith that the agreement restrained trade more than necessary. For at least three months, a non-local contractor must pay its employees the maximum travel amount, $35 per day. This maximum continues to apply to those jobs begun during the initial three months. The defendants failed to provide a satisfactory business or labor justification for it, although we gave them several opportunities to do so at oral argument.

b. *Frivolous Parties*

The defendants argue that because Local 440 and Southern Sierras NECA were the only parties to the agreement, Community Electric's counsel joined other parties improperly.

Joining in a contract, combination or conspiracy violating section 1 does not require signing the agreement. Concerted action is enough. *See Granddad Bread, Inc. v. Continental Baking Co.*, 612 F.2d 1105, 1111-12 (9th Cir. 1979) (element of prima facie case), *cert. denied*, 449 U.S. 1026 (1981).

Although this circuit evaluates the pleading as a whole, we have considered imposing sanctions for improperly naming a party in a suit. *See Rachel v. Banana Republic, Inc.*, 831 F.2d 1503, 1508 (9th Cir. 1987) (denying sanctions for joining The Gap as a co-defendant). To

warrant sanctions, joining the party must be baseless or lacking in plausibility. *Id.*

Community Electric sued seven parties other than Local 440 and Southern Sierras NECA. John Gomes and Dennis Thorsen [sic] were included. They served on the labor management committee that heard disputes over the travel/subsistence provision. The committee decided unanimously against Community Electric, enforcing the terms of the agreement. This constituted direct evidence of participation in a contract, combination or conspiracy. *See Oltz v. St. Peter's Community Hosp.*, Nos. 87-3944, 87-3945, slip op. at 14571 (9th Cir. Nov. 28, 1988).

Community Electric also joined National NECA and International IBEW. The defendants argue that opposing summary judgment as to these parties was frivolous even if naming them in the complaint was not.

Although Community Electric's opposition to summary judgment presents a close question, the absence of a genuine issue of fact is not dispositive. *See Zaldivar*, 780 F.2d at 830. In *California Architectural Bldg. Prod., Inc. v. Franciscan Ceramics, Inc.*, 818 F.2d 1466, 1467 (9th Cir. 1987), *cert. denied*, 108 S. Ct. 699 (1988), several businesses sued a ceramic tile manufacturer under RICO for assuring them that it would continue in business. Plaintiffs alleged that it had decided to close much earlier. This court affirmed the grant of summary judgment in favor of the defendant, but reversed the award of sanctions against plaintiffs' attorney for bringing suit. *Id.* at 1472.

We concluded that Franciscan's sudden closing was circumstantial evidence of a possible undisclosed plan to close early. *Id.* The action was not baseless or lacking in

plausibility even though the defendants failed to adduce enough evidence to create a genuine issue of fact. *Id.*

We applied the same standard in *Rachel*, 831, F.2d at 1508. The plaintiff joined The Gap as a co-defendant liable for the acts of its wholly-owned subsidiary, Banana Republic. Again, the plaintiff failed to produce sufficient evidence to raise a genuine issue of fact. The defendants' letter to the plaintiff on stationery from The Gap was crucial to the determination that sanctions were not warranted. *Id.*

Applying the standard of these cases, the court denied sanctions properly. Community Electric had evidence that representatives of both National NECA and International IBEW were directly involved in responding to its challenge to the agreement. It also had evidence that NECA reviewed and approved the agreement. Even assuming the absence of a genuine issue of fact, the possibility of NECA's and IBEW's participation in the conspiracy was not so baseless or lacking in plausibility to warrant sanctions.

The defendants assert finally that joining the IBEW-NECA Pension Trust Fund, the Los Angeles NECA, and Local 11 was frivolous because those entities merely pursued their legal rights against Community Electric. It responds that these parties enforced rules against it discriminatorily because of its objections to the agreement. Since Community Electric did not mention these parties in its opposition to summary judgment, we consider only whether including them in the complaint warranted sanctions.

The relative timing of the actions against Community Electric provided enough circumstantial evidence to justify denying sanctions. *See California Architectural Bldg. Prod., Inc.*, 818 F.2d at 1472. Community Electric offered evidence that the pension trust fund threatened liens and related labor problems if it continued to work in Palm Springs. During the dispute over the provisions, Local 11 removed its men from job sites in Los Angeles ostensibly for Community Electric's failure to make its monthly contributions and reports. Similar delays had occurred in the past without this response. Finally, Los Angeles NECA failed to represent Community Electric's interests at labor management meetings and participate in decisions harassing Community Electric.

This evidence at least gave Community Electric an arguable claim. *See e.g., Los Angeles Memorial Coliseum Comm'n*, 726 F.2d at 1391 (requiring (1) an agreement (2) through which the parties intend to harm or restrain competition (3) that actually injures competition); *cf. Eliason Corp. v. National Sanitation Found.*, 614 F.2d 126, 129 (6th Cir.) (requiring evidence of discrimination or arbitrary exclusion), *cert. denied*, 449 U.S. 826 (1980).

The antitrust aspects of this case also affect our determination. We acknowledge the lenient evidentiary requirements for proving a conspiracy violating antitrust laws. Federal courts grant wide latitude in concluding conspiracy or collusion from parallel conduct and the inferences drawn from the circumstances. *See Monsanto Co. v. Spray-Rite Serv. Corp.*, 465 U.S. 752, 764 (1984) (fact finder may infer agreement from evidence that tends to exclude the possibility that entities acted independently).

We grant summary judgment less frequently in the antitrust context, in part because the alleged conspirators control the proof. *See Calnetics Corp. v. Volkswagen of Am., Inc.*, 532 F.2d 674, 683 (9th Cir.) *cert. denied*, 429 U.S. 940 (1976). This less demanding standard should also apply under Rule 11 to evaluate the associated documents.

2. *Response to the Statement of Uncontroverted Facts*

This paper addressed only factual questions. We review the court's denial of sanctions under a clearly erroneous standard. *Golden Eagle*, 801 F.2d at 1538. We find no evidence (and the defendants have indicated none) leaving us with a definite and firm conviction that the court committed a mistake. *See, e.g., Dollar Rent A Car of Washington, Inc. v. Travelers Indemnity Co.*, 774 F.2d 1371, 1374 (9th Cir. 1985).

CONCLUSION

The district court properly granted summary judgment in favor of the defendants and denied their motion for Rule 11 sanctions.

AFFIRMED.

WIGGINS, J., Concurring:

I concur in part I of the opinion and in the judgment affirming the district court. I write separately because I detect in part II of the majority opinion a tolerance of single, post-judgment motions for sanctions that accumulate all manner of perceived misdeeds occurring during

the course of the litigation. Although a rigid rule prohibiting such motions in all cases may be inappropriate, we owe a duty to the bar to tilt the district courts away from such action. The majority opinion, in my view, does not do so.

The complaint by Community Electric was filed on January 13, 1986. It alleged violations of the Sherman Act, the Racketeer Influence and Corrupt Organizations Act and several related California state law claims. The complaint was proper in form and content and no challenge was then made to it by the defendants.

The powers, rights and privileges of the plaintiff, Community Electric, had been suspended by the California Secretary of State before the filing of this lawsuit. The defendants asserted that Community Electric lacked the capacity to sue. Community Electric thereupon acted to restore its capacity, shortly before trial but after the statute of limitations had expired under California law. This sequence of events poses the issue discussed in part I of the opinion.

Nothing in defendant's arguments suggest that the plaintiff acted improperly in filing its claim and thereafter reviving its corporate powers to overcome the consequence of an earlier failure to pay corporate taxes. That we conclude that the actions of Community Electric did not save it from the defense of the statute of limitations is of no special consequence to the motion for sanctions. There is always a loser in contested litigation.

In sum, the district court concluded that the plaintiff's claim was barred by the statute of limitations and it granted defendant's motion for summary judgment.

Within 30 days thereafter, defendant moved for sanctions against the plaintiff. That motion was denied.

Under the circumstances herein set forth, I believe the district court should be affirmed because the motion for sanctions comes too late to serve its intended purpose. Accordingly, it is unnecessary to discuss at length the propriety of the court's ruling on the merits of the request for sanctions.

We considered the issue presented here – the propriety of a single post-judgment request for sanctions for various alleged acts of misconduct occurring during the pretrial and trial period – in *Matter of Yagman*, 796 F.2d 1165 (9th Cir. 1986). We concluded there that such a request "flies in the face of the primary purpose of sanctions, which is to deter subsequent abuse." 796 F.2d at 1183. Deterrence, we held, is furthered by punishing the offender at the time of the transgression. *id.*

We did not hold in *Yagman* that the preference for avoiding a post-judgment lump sum claim for sanctions is an inflexible rule. But in those cases in which such a claim may be appropriate, we held that an early notice to the offending attorney that continuation of misconduct may result in a sanction is the desired procedure. *Id.* at 1184 (" . . . if the purposes of the rules are to be served, the sanctionable behavior should be brought to the immediate attention of the offending attorney.")

The majority opinion makes reference to *Matter of Yagman*. It concludes that *Yagman* holds that the timing of a sanctioned motion is committed to the sound discretion of the district court. Majority Opinion, p. 1794. The majority does not read *Yagman* as I do. I believe it stated a

strong preference for an earlier filing of a motion for sanction than occurred here.

I believe we are doing a disservice to the bench and to the bar in approving the procedure followed in this case. We should simply affirm the denial of sanctions because it appears that the motion was not timely filed.

APPENDIX B

FOR PUBLICATION

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

COMMUNITY ELECTRIC SERVICE OF LOS ANGELES, INC., *Plaintiff-Appellee,* v. NATIONAL ELECTRICAL CONTRACTORS ASSOCIATION, INC., ET AL., *Defendants-Appellants.*	Nos. 87-6280, 88-5616 & 88-5663 DC. No. CV-86-0254-RSWL AMENDED OPINION

Appeal from the United States District Court
for the Central District of California
Ronald S.W. Lew, District Judge, Presiding

Argued and Submitted
November 4, 1988 – Pasadena, California

Filed March 6, 1989
Amended April 27, 1989

Before: Eugene A. Wright, William A. Norris and Charles Wiggins, Circuit Judges.

Opinion by Judge Wright

SUMMARY

Courts and Procedure

Affirming the district court's grant of summary judgment, the court held that because F.R.C.P. Rule 17(b)

prevailed over antitrust law, the court was required to apply California law and time barred the complaint.

Three appeals from an antitrust suit with nine defendants were consolidated. Community Electric Service of Los Angeles, Inc. (Community Electric) filed a complaint alleging violations of the Sherman Act and other federal statutes and related California state law claims, naming as defendants several union organizations. The Franchise Tax Board had suspended Community Electric's corporate powers, rights and privileges and defendants answered the complaint claiming a lack of capacity to sue. In May, 1987, the California Secretary of state's office suspended Community electric's [sic] corporate powers, rights and privileges, but Community Electric obtained a certificate of revivor in June, 1987. The district court dismissed the case in August, 1987, holding that Community Electric lacked the capacity to file a complaint in January, 1986 due to the 1983 suspension and that reinstatement was ineffective to validate the January filing because the antitrust statute of limitation expired May, 1987, four years after Community Electric ceased doing business and before reinstatement occurred.

[1] Rejecting Community Electric's argument that federal antitrust law should prevail because of the federal interest involved, the court held that F.R. Civ. P. Rule 17(b), which provides that corporate capacity to sue is determined by the law of the state under which it was organized, prevailed over antitrust law and required the court to apply California law [2] to find that Community Electric had no capacity to sue in January 1986 because the corporations' rights, powers and privileges were suspended by the Franchise Tax Board under California law.

[3] In determining what the law is in California as to whether Community Electric may obtain retroactively the capacity to sue, [4] the court analyzed State court of appeal decisions to find that California has determined that the expiration of the statute of limitations bars a delinquent corporation's claim.

COUNSEL

D. William Heine, Los Angeles, California; Gary L. Lieber, Washington, D.C.; Jack R. White, Los Angeles, California, for the defendants-appellants, National Electrical Contractors Association; Elizabeth R. Lishner, Los Angeles, California, for the defendants-appellees-cross-appellants, IBEW Local Union No. 11.

Pamela Victorine, Beverly Hills, California; John P. McNicholas, Los Angeles, California, for the plaintiff-appellee, Community Electric Service.

OPINION

WRIGHT, Circuit Judge:

This case involves the consolidation of three appeals from an antitrust suit with nine defendants. We must determine whether Community Electric Service, Inc. had the capacity to sue in federal court and whether its pleadings warrant Rule 11 sanctions.

FACTS

Community Electric, an electrical contracting company operating in Los Angeles County, bid successfully on a Palm Springs contract in an effort to expand its business geographically. It signed a letter of assent binding it to a collective bargaining agreement between the International Brotherhood of Electrical Workers (IBEW) Local 440 and Southern Sierras National Electrical Contractor's Association, Inc. (NECA).

The IBEW Local 440 – Southern Sierras NECA agreement (termed "the Inside Wiremans' Agreement") has a provision effectively imposing a $35 per day travel/subsistence payment on non-local contractors for each employee on a job. It applies to jobs begun before the contractor has maintained a permanent place of business within the jurisdiction for 90 days.

Community Electric contends vigorously that this provision has the purpose and effect of excluding non-local contractors. It claims that the provision sets prices and makes it impossible for non-local contractors to compete on equal footing with local contractors.

Community Electric attempted dispute resolution under the terms of the agreement. A labor management committee ruled against it unanimously.

These provisions were also the subject of proceedings before the National Labor Relations Board. It held the subsistence payments a mandatory subject of bargaining and enforceable, but declined to address the antitrust implications.

Community Electric asserts that its challenges resulted in retaliatory action. Besides claiming harassment from Southern Sierras NECA and Local 440, Community Electric alleges additional harassment from their Los Angeles counterparts. It contends that Los Angeles NECA and Local 11, as well as the IBEW-NECA pension trust fund, enforced several rules discriminatorily.

On January 13, 1986, Community Electric filed a complaint alleging violations of the Sherman Act, the Racketeer Influenced and Corrupt Organizations Act (RICO),

and related California state law claims. It named as defendants the Southern Sierras and Los Angeles County Chapters of the NECA, their parent body, National NECA, Locals 11 and 440 of the IBEW, their parent body, International IBEW, two owners of electrical contracting firms from Palm Springs, John Gomes and Dennis Thorsen [sic], and the Southern California IBEW-NECA Pension Trust Fund.

On July 1, 1983, before the filing, the California Franchise Tax Board had suspended Community Electric's corporate powers, rights, and privileges. The defendants in their answer alleged Community Electric's lack of capacity to sue.

On May 28, 1987, the California Secretary of State's Office informed the defendants that Community Electric's corporate powers, rights, and privileges were suspended. The defendants notified Community Electric and on June 8 filed a request for a status conference. That day, the California Tax Franchise Board issued a certificate of revivor reinstating Community Electric's corporate powers for the purpose of pursuing this litigation.

On August 6, 1987, the court dismissed the case, holding that Community Electric lacked the capacity to file a complaint in January 1986 due to the July 1983 suspension. It also determined that the reinstatement was ineffective to validate the January filing. The antitrust statute of limitation expired May 6, 1987, four years after Community Electric ceased doing business. The June 8 reinstatement occurred too late.

After the dismissal, the defendants moved for Rule 11 sanctions. The court denied them, concluding that

neither the complaint nor Community Electric's subsequent documents violated Rule 11's "Frivolousness Clause."

Community Electric appeals the grant of summary judgment and defendants appeal the denial of their Rule 11 motion.

DISCUSSION

I. *Time Barring of Community Electric's Claims*

A. *Capacity to File Suit*

Federal Rule of Civil Procedure 17(b) provides that "[t]he capacity of a corporation to sue or be sued shall be determined by the law under which it was organized." Community Electric filed before the antitrust statute of limitation (15 U.S.C. § 15b (1982)) expired. The court held it had no capacity to sue under California law, the law of the state where it incorporated. Community Electric argues that federal antitrust law should prevail because of the federal interest involved.

[1] We hold that Rule 17(b) prevails over antitrust law and requires us to apply California law. In *Levin Metals Corp. v. Parr-Richmond Terminal Co.*, 817 F.2d 1448, 1451 (9th Cir. 1987), we rejected the argument that the Comprehensive Environmental Response Compensation Liability Act of 1980 (CERCLA) prevails over 17(b). The plaintiffs sued a corporation for claims arising after its dissolution. *Id.* at 1449. As the plaintiffs in that case, Community Electric cites no authority in support of its position and other courts have held to the contrary. *See id.* at 1451.

We follow the other circuits that apply state law even when it requires dismissing an antitrust suit. *See Moore v. Matthew's Book Co.*, 597 F.2d 645, 646-47 (8th Cir. 1979); *R. V. McGinnis Theatres v. Video Indep. Theatres, Inc.*, 386 F.2d 592, 593-95 (10th Cir. 1967), *cert. denied*, 390 U.S. 1014 (1968). This follows since corporations are creatures of state law. *Cf. Cort v. Ash*, 422 U.S. 66, 84 (1975) ("Corporations are creatures of state law").

The facts of *R. V. McGinnis Theaters* parallel this case. 386 F.2d at 593-94. McGinnis sued for alleged antitrust violations. Oklahoma had revoked McGinnis' charter for failing to pay its corporate franchise tax. McGinnis relied on a later reinstatement.

The Tenth Circuit affirmed the lower court decision to dismiss. *Id.* at 594-95. The relevant statute permitted reinstatement only where payment of the tax occurs within a year of suspension and McGinnis had paid after the year expired. *Id.*

[2] Applying California law, Community Electric had no capacity to sue in January 1986. Section 23301 of the California Revenue and Tax Code provides that the Franchise Tax Board may suspend the rights, powers and privileges of a corporation for nonpayment of taxes.

A delinquent California corporation may neither bring suit nor defend a legal action. *E.g., Green v. Norman*, 309 P.2d 809, 812 (Cal. 1957). We have repeatedly acknowledged this as the law of California. *See United States v. 2.61 Acres of Land, More or Less*, 791 F.2d 666, 668 (9th Cir. 1985) (reversing refusal to grant continuance in order to enable corporation to revive itself); *cf. In re Christian & Porter Aluminum Co.*, 584 F.2d 326, 331-32 (9th

Cir. 1978) (appeal by 14 suspended California corporations dismissed). Because the Franchise Tax Board suspended Community Electric, it had no capacity to sue.

B. *Retroactive Effect of Corporate Revival*

The antitrust statute of limitation expired May 6, 1987. The Board reinstated Community Electric on June 8, 1987. Community Electric argues that this reinstatement gave it the capacity retroactively for the January filing.

[3] We apply California law to determine whether Community Electric may obtain retroactively the capacity to sue. The California statutory scheme provides for suspension under § 23301 and revival under § 23305 or § 23305b. Community Electric was revived without paying its taxes under § 23305b. Section 23305a, which applies to revival under either §§ 23305 or 23305b, states: "[u]pon the issuance of such certificate by the Franchise Tax Board the taxpayer therein named shall become reinstated but *such reinstatement shall be without prejudice to any action, defense or right which has accrued by reason of the original suspension or forfeiture.*" (emphasis supplied).

No California Supreme Court decision has addressed the situation where the revivor issues after the statute of limitation has expired. Every California court facing this question has held that corporate reinstatement will not validate retroactively the earlier filing. These decisions conclude that the expiration of a statute of limitation qualifies as a "defense" that "has accrued."

Since we must apply California law and have no Supreme Court decision, we look to the decisions of the

intermediate state courts of appeal. *See, e.g., Miller v. Fairchild Indus., Inc.*, 797 F.2d 727, 735 (9th Cir. 1986) (applying California law to breach of contract claims). We follow the decision of a state court of appeal unless convincing evidence exists that the state supreme court would decide the issue differently. *Id.*

The court below specifically relied on *Welco Constr., Inc. v. Modulux, Inc.*, 120 Cal. Rptr. 572, 573 (Ct. App.), *cert. denied*, 120 Cal. Rptr. 572 (1975). Welco had filed a complaint after suspension of its corporate status. Modulux answered, but did not challenge Welco's standing to prosecute until the day of trial. Welco obtained a certificate of revivor on that day. The trial court permitted Modulux to amend its answer to plead the statutes of limitations and granted a judgment of nonsuit.

The court of appeal affirmed, applying the language of § 23305a. *Id.* at 574-75. It concluded that prior California decisions distinguish a plea in abatement from a defense. Facts warranting a plea in abatement must exist at the time of the plea and corporate revivor will validate retroactively the acts abated. In contrast, a statute of limitations is a defense and the revivor will not validate a prior filing of suit. *Id.*

Recently another California court of appeal reaffirmed the holding in *Welco* and the California Supreme Court denied review, as it had for *Welco*. *See ABA Recovery Serv., Inc. v. Konold*, 244 Cal. Rptr. 27, 30 (Ct. App. 1988). Although *ABA Recovery* involved a separate statute of limitation, the court applied the *Welco* analysis and reached the same result. *See id.; accord Electronic Equipment Express, Inc. v. Donald H. Seiler & Co.*, 176 Cal. Rptr.

239, 245 (Ct. App. 1981) (revival of a corporation cannot prejudice a statute of limitations defense that accrues during suspension of its powers).

Community Electric says that *Welco* does not represent California law or does not apply to this suit. First, it argues that corporate revival validates retroactively all prior acts undertaken during periods of suspension, even after accrual of a defense. Second, it argues that *Welco* treats a statute of limitation as a meritorious defense incorrectly.

Community Electric provides no persuasive reason for treating the antitrust statute of limitation differently than those involved in *Welco* and *ABA Recovery*. Both cases dealt with the argument that corporate revival validates retroactively all prior acts undertaken during periods of suspension. Both rejected the argument, relying on *Traub Co. v. Coffee Break Serv., Inc.*, 57 Cal. Rptr. 846, 848 (1967). The court in *Traub* allowed a revivor to validate a judgment obtained during suspension, but distinguished *Cleveland v. Gore Bros., Inc.*, 58 P.2d 931 (Cal. Ct. App. 1936), as "present[ing] a statute of limitations problem." 57 Cal. Rptr. at 848.

Community Electric cites no authority that convinces us that the California Supreme Court has changed its position since *Traub*. This seems true where, as here, the Court had a recent opportunity to address the issue but avoided it. *See Tenneco West, Inc. v. Marathon Oil Co.*, 756 F.2d 769, 771 (9th Cir.), *cert. denied*, 474 U.S. 845 (1985) (intermediate appellate state court decision not to be disregarded, particularly where the highest court has refused to review).

[4] We also disagree that *Welco* treats a statute of limitation as a meritorious defense incorrectly. Three court of appeal decisions have squarely held otherwise. *See ABA Recovery*, 244 Cal. Rptr. at 30; *Welco*, 120 Cal. Rptr. at 575; *Cleveland*, 58 P.2d at 932. *Welco* concluded that statutes of limitation are vital to the welfare of society, favored by the law, viewed as statutes of repose and as such constitute meritorious defenses, 120 Cal. Rptr. at 575 (quoting *Scheas v. Robertson*, 238 P.2d 982, 986 (Cal. 1951)). If California determines that the expiration of the statute bars a delinquent corporation's claim, we may not modify that conclusion.

C. *Equitable Tolling During NLRB Proceedings*

Local 440 brought proceedings before the NLRB to establish the subsistence payments as a mandatory subject of bargaining. Involved were the same provisions challenged by Community Electric.

It asks us to extend the equitable tolling of *Mt. Hood Stages, Inc. v. Greyhound Corp.*, 616 F.2d 394 (9th Cir.), *cert. denied*, 449 U.S. 831 (1980), to this case. It argues that the NLRB proceedings tolled the antitrust statute of limitation because they may affect the applicability of the nonstatutory labor exemption from the antitrust laws.

We decline to make that extension. The equitable tolling of *Mt. Hood* rested on considerations of federal policy and primary jurisdiction not present here. *See id.* at 403. Mt. Hood, a bus company, asked the Interstate Commerce Commission to modify its approval on acquisitions by Greyhound, a competitor. *Id.* at 395. Mt. Hood later filed an antitrust suit against Greyhound. Greyhound

would have argued that the acquisitions were immune had Mt. Hood sued before the ICC made the modification requested. *See Mt. Hood Stages, Inc. v. Greyhound Corp.*, 555 F.2d 687, 688 (9th Cir. 1977), *vacated*, 437 U.S. 322 (1978).

We decided that the doctrine of primary jurisdiction provides the "relevant federal procedural law to guide the decision to toll the limitations period." 616 F.2d at 403. This follows because the court could issue no injunction and award no damages until the ICC exercised its primary jurisdiction. *Id.*

Here, the NLRB proceedings did not toll the limitations period since prior resort to the Board was not a prerequisite to review in federal court. *See, e.g., Nichols v. Hughes*, 721 F.2d 657, 660 (9th Cir. 1983) (period tolled if resort to administrative body is prerequisite to court's review). When considering the nonstatutory labor exemption, courts make the determination independently. *See, e.g., California Dump Truck Owners Ass'n, Inc. v. Associated Gen. Contractors of Am., Inc.*, 562 F.2d 607, 614 (9th Cir. 1977).

D. *Due Process Claim*

Community Electric argues that the suspension of its corporate powers without actual notice resulted in a taking of its property without due process. It raised the question below in two lines of a lengthy brief without argument or citation to authority. Since the court never ruled on it and we have no developed record to review, we decline to address the question. We have discretion to determine what questions to consider and resolve for the first time on appeal. *See Singleton v. Wulff*, 428 U.S. 106,

120-21 (1976); *Quinn v. Robinson*, 783 F.2d 776, 814-15 (9th Cir.), *cert. denied*, 479 U.S. 882 (1988).

II. *The Rule 11 Motion*

A. *Standard of Review*

The defendants challenge the court's denial of its Rule 11 motion. This court reviews *de novo* the legal conclusion whether specific conduct violated Rule 11. *E.g., Golden Eagle Distrib. Corp. v. Burroughs Corp.*, 801 F.2d 1531, 1538 (9th Cir. 1986). It reviews any factual determinations by the court under a clearly erroneous standard. *Id.*

B. *Timing of the Rule 11 Motion*

Community Electric's counsel argues that summary judgment applying the statute of limitation makes the Rule 11 motion untimely. In substance, he argues that the motion forces us to address the merits.

We may address the denial of sanctions without looking too deeply into the merits of the case. *See Lemos v. Fencl*, 828 F.2d 616, 618 (9th Cir. 1987) ("It is not necessary for us to resolve the underlying legal issue in order to review the sanction award because even a petition that is correctly dismissed on its merits will not necessarily warrant sanctions.").

Community Electric's counsel also contends, somewhat inconsistently, that the defendants filed a late motion for sanctions. He asserts that they should have made the request after each allegedly frivolous pleading or before judgment.

The timeliness of the Rule 11 motion rests within the judge's discretion. *See* Advisory Committee Note of 1983 to Amended Rule 11 ("The time when sanctions are to be imposed rests in the discretion of the trial judge."). The optimum timing of sanctions to further the deterrence aspect of Rule 11 depends on the circumstances. *In re Yagman*, 796 F.2d 1165, 1184 (9th Cir. 1986), *cert. denied*, 108 S. Ct. 450 (1987). This requires discretion.

Other circuits have approached the timeliness question differently. Several have analogized the request for Rule 11 sanctions with requests for attorneys fees or costs. *See Muthig v. Brant Point Nantucket, Inc.*, 838 F.2d 600, 604 (1st Cir. 1988) (referring to local rule on attorneys fees); *Szabo Food Serv., Inc. v. Canteen Corp.*, 823 F.2d 1073, 1079-80 (7th Cir. 1987) (local rule on costs and attorneys fees), *cert. dismissed*, 108 S. Ct. 1101 (1988).

The Third Circuit employs a more demanding approach that we decline to adopt. *See Mary Anne Pensiero, Inc. v. Lingle*, 847 F.2d 90, 99-100 (3d Cir. 1988) (motion required prior to entry of judgment). Although we agree with that court's concerns regarding early notification and the efficient use of judicial resources, *see Yagman*, 796 F.2d at 1184 (early notification of sanctionable behavior desirable), we believe these matters rest properly within the sound discretion of the trial judge.

The court below did not abuse its discretion. The defendants filed within 30 days of the entry of judgment, the time required to request attorneys fees. *See* C.D. Cal. Ct. R. 16.10.

C. *Rule 11 Objective Standards*

The defendants contend that Community Electric filed several frivolous pleadings in violation of Fed. R. Civ. P. 11. The Rule states:

> The signature of an attorney or party constitutes a certificate by the signer that the signer has read the *pleading, motion,* or *other paper,* that to the best of the signer's knowledge, information and belief formed after reasonable inquiry *it* is well grounded in fact and is warranted by existing law or a good faith argument for the extension, modification or reversal of existing law . . . (emphasis supplied).

This language requires us to evaluate the pleading or paper filed as a whole. *See Zaldivar v. City of Los Angeles,* 780 F.2d 823, 831 (9th Cir. 1986) ("Rule 11 sanctions shall be assessed if *the paper* filed in district court and signed by an attorney . . . is frivolous, legally unreasonable, or without factual foundation. . . .") (emphasis supplied).

This court held recently that it would not impose sanctions even where a complaint contains false allegations. *Murphy v. Business Cards Tomorrow, Inc.,* 854 F.2d 1202, 1205 (9th Cir. 1988). Citing *Golden Eagle Distrib. Corp.,* 801 F.2d at 1540, we stated that Rule 11 permits sanctions only where the pleading as a whole is frivolous. 854 F.2d at 1205. *Accord Burull v. First Nat'l Bank,* 831 F.2d 788, 789-90 (8th Cir. 1987), *cert. denied,* 108 S. Ct. 1225 (1988) (several groundless claims did not make the pleading frivolous as a whole); *In re Ruben,* 825 F.2d 977, 987 (6th Cir. 1987) (same under 42 U.S.C. § 1988), *cert. denied,* 108 S. Ct. 1108 (1988).

We appeared to limit the "frivolous as a whole" standard in *Hudson v. Moore Business Forms, Inc.,* 836 F.2d

1156, 1163 (9th Cir. 1987). Hudson, an unemployed woman over 50, sued her former employer and others in an action alleging wrongful discharge and sex discrimination. *See id.* at 1157, 1162-63. The employer, Moore Business Forms, Inc., filed an answer and counterclaim that alleged tortious conduct by Hudson in connection with her discharge, and requested $200,000 in compensatory damages, and $4 million in punitive damages, costs and attorney's fees. *Id.* at 1157. We said that nothing in Rule 11 prevents "an independent analysis of the prayer for relief to determine whether it is frivolous and brought for an improper purpose." *Id.* at 1163. *Hudson* does not control because its holding rested on the improper purpose of the employer and the harassing nature of the counterclaim. *See id.* We make a different examination when a party complains that a litigant interposed a pleading for an improper purpose. An entire pleading has a harassing or improper purpose if the litigant included one of the claims or allegations with that purpose. This explains the independent analysis of the prayer for relief. *See id.* Here, the defendants do not allege improper purpose.

We apply an objective standard when evaluating the pleading as a whole. We evaluate also the attorney's conduct at the time of signing. *See, e.g., Cunningham v. County of Los Angeles,* 859 F.2d 705, 714 (9th Cir. 1988). Rule 11 requires such examination into the facts and applicable law warranted under the circumstances of the case. *Zaldivar,* 780 F.2d at 831. A court must impose sanctions if competent counsel could not form a reasonable belief that the pleading or other paper is warranted by existing law or a good faith argument for the extension, modification, or reversal of existing law. *Golden*

Eagle, 801 F.2d at 1537. It follows that sanctions are inappropriate where reasonable and competent attorneys could disagree over the existence of a good faith argument.

D. *Community Electric's Pleadings*

The defendants challenge three papers filed by Community Electric's counsel: (1) the complaint, (2) the opposition to summary judgment, and (3) the response to defendants' statement of uncontroverted facts.

1. *The Complaint and Opposition to Summary Judgment*

a. *Sherman Act Section 1 Claim*[1]

Community Electric claims that the provisions of the Inside Wiremans' Agreement violate section 1 of the Sherman Act. If reasonable and competent attorneys could disagree over the existence of a good faith argument, sanctions are inappropriate. *See Golden Eagle*, 801 F.2d at 1537.

Competent attorneys could make a good faith argument that the agreement constituted a *per se* violation of section 1. The Supreme Court has held certain economic practices so clearly anticompetitive that they are illegal *per se*. *See, e.g., Northern Pac. Ry. Co. v. United States*, 356

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[1] Since we conclude that the antitrust claims in Community Electric's complaint and its opposition to summary judgment were not frivolous, we need not address the other less significant claims contained in these documents. These pleadings as a whole were not frivolous.

U.S. 1, 5 (1958). Price fixing is such a practice. *Id.* The Court has said:

> [A] combination formed for the purpose and with the effect of raising, depressing, fixing, pegging, or stabilizing the price of a commodity in interstate or foreign commerce is illegal per se.

United States v. Socony-Vacuum Oil Co., 310 U.S. 150, 223 (1940).

There could be a good faith argument that the collective bargaining agreement had the purpose and effect of stabilizing prices. In *National Elec. Contractors Ass'n v. National Constructors Ass'n*, 678 F.2d 492, 501 (4th Cir. 1982), *cert. dismissed*, 463 U.S. 1233 (1983), the IBEW and NECA agreed to include a provision in all IBEW construction contracts requiring the employer to contribute 1% of his gross labor payroll to the National Electrical Industry Fund. The court affirmed summary judgment finding price fixing because the provision interfered with market forces that set the price of such contracts and robbed non-NECA contractors of a competitive advantage. *Id.; compare T.W. Elec. Serv., Inc. v. Pacific Elec. Contractors Ass'n*, 809 F.2d 626, 634-35 (9th Cir. 1987) (affirming summary judgment for defendants in suit involving similar provision due to insufficient evidence of conspiracy and injury to competition).

The travel/subsistence provision interferes with market forces and may stabilize the price that electrical contractors in Palm Springs charge. It permits local contractors to charge more for their contracts than without the provision, knowing that non-local contractors must pay a higher rate to employees for the same services and will not successfully underprice them.

The defendants claim also that Community Electric's counsel had no objective basis to believe that the agreement injured competition. Such injury is an element of a section 1 violation under the rule of reason. *See Los Angeles Memorial Coliseum Comm'n v. National Football League*, 726 F.2d 1381, 1391 (9th Cir.), *cert. denied*, 469 U.S. 990 (1984). Community Electric's counsel provided the affidavit of a labor economist, showing a good faith belief formed after reasonable inquiry as Rule 11 requires.

The defendants also assert that collateral estoppel after the NLRB proceeding made Community Electric's antitrust claim frivolous. They rely on the Administrative Law Judge's finding that the union (and the associated labor management committee) acted in good faith.

A finding of good faith in executing an agreement does not foreclose the possibility of an anticompetitive purpose. The inquiry regarding improper purpose is confined to a consideration of the impact of the agreement on competitive conditions. *National Soc'y of Professional Engineers v. United States*, 435 U.S. 679, 690 (1978).

The defendants contend finally that Community Electric's counsel had no good faith argument that the provisions do not fall within the nonstatutory labor exemption to the antitrust laws. This exemption prevents the antitrust laws from frustrating the goal of labor law, to permit employees to organize for the improvement of wages and working conditions. *E.g., Richards v. Nielson Freight Lines*, 810 F.2d 898, 905 (9th Cir. 1987). The defendants rely on the fact that the agreement concerns employee wages.

A union imposed restraint will fall outside the exemption if it produces significant anticompetitive

effects, *Id.*; *see Consolidated Express, Inc. v. New York Shipping Ass'n, Inc.*, 602 F.2d 494, 521 (3d Cir. 1979) (requiring that agreement restrain trade no more than necessary to advance a legitimate labor goal), *vacated on other grounds*, 448 U.S. 902 (1980).

A competent attorney could argue in good faith that the agreement restrained trade more than necessary. For at least three months, a non-local contractor must pay its employees the maximum travel amount, $35 per day. This maximum continues to apply to those jobs begun during the initial three months. The defendants failed to provide a satisfactory business or labor justification for it, although we gave them several opportunities to do so at oral argument.

b. *Frivolous Parties*

The defendants argue that because Local 440 and Southern Sierras NECA were the only parties to the agreement, Community Electric's counsel joined other parties improperly.

Joining in a contract, combination or conspiracy violating section 1 does not require signing the agreement. Concerted action is enough. *See Granddad Bread, Inc. v. Continental Baking Co.*, 612 F.2d 1105, 1111-12 (9th Cir. 1979) (element of prima facie case), *cert. denied*, 449 U.S. 1026 (1981).

Although this circuit evaluates the pleading as a whole, we have considered imposing sanctions for improperly naming a party in a suit. *See Rachel v. Banana Republic, Inc.*, 831 F.2d 1503, 1508 (9th Cir. 1987) (denying

sanctions for joining The Gap as a co-defendant). To warrant sanctions, joining the party must be baseless or lacking in plausibility. *Id.*

Community Electric sued seven parties other than Local 440 and Southern Sierras NECA. John Gomes and Dennis Thorsen [sic] were included. They served on the labor management committee that heard disputes over the travel/subsistence provision. The committee decided unanimously against Community Electric, enforcing the terms of the agreement. This constituted direct evidence of participation in a contract, combination or conspiracy. *See Oltz v. St. Peter's Community Hosp.*, 861 F.2d 1440, 1451 (9th Cir. 1988).

Community Electric also joined National NECA and International IBEW. The defendants argue that opposing summary judgment as to these parties was frivolous even if naming them in the complaint was not.

Although Community Electric's opposition to summary judgment presents a close question, the absence of a genuine issue of fact is not dispositive. *See Zaldivar*, 780 F.2d at 830. In *California Architectural Bldg. Prod., Inc. v. Franciscan Ceramics, Inc.*, 818 F.2d 1466, 1467 (9th Cir. 1987), *cert. denied*, 108 S. Ct. 699 (1988), several businesses sued a ceramic tile manufacturer under RICO for assuring them that it would continue in business. Plaintiffs alleged that it had decided to close much earlier. This court affirmed the grant of summary judgment in favor of the defendant, but reversed the award of sanctions against plaintiffs' attorney for bringing suit. *Id.* at 1472.

We concluded that Franciscan's sudden closing was circumstantial evidence of a possible undisclosed plan to

close early. *Id.* The action was not baseless or lacking in plausibility even though the defendants failed to adduce enough evidence to create a genuine issue of fact. *Id.*

We applied the same standard in *Rachel*, 831 F.2d at 1508. The plaintiff joined The Gap as a co-defendant liable for the acts of its wholly-owned subsidiary, Banana Republic. Again, the plaintiff failed to produce sufficient evidence to raise a genuine issue of fact. The defendants' letter to the plaintiff on stationery from The Gap was crucial to the determination that sanctions were not warranted. *Id.*

Applying the standard of these cases, the court denied sanctions properly. Community Electric had evidence that representatives of both National NECA and International IBEW were directly involved in responding to its challenge to the agreement. It also had evidence that NECA reviewed and approved the agreement. Even assuming the absence of a genuine issue of fact, the possibility of NECA's and IBEW's participation in the conspiracy was not so baseless or lacking in plausibility to warrant sanctions.

The defendants assert finally that joining the IBEW-NECA Pension Trust Fund, the Los Angeles NECA, and Local 11 was frivolous because those entities merely pursued their legal rights against Community Electric. It responds that these parties enforced rules against it discriminatorily because of its objections to the agreement. Since Community Electric did not mention these parties in its opposition to summary judgment, we consider only whether including them in the complaint warranted sanctions.

The relative timing of the actions against Community Electric provided enough circumstantial evidence to justify denying sanctions. *See California Architectural Bldg. Prod., Inc.*, 818 F.2d at 1472. Community Electric offered evidence that the pension trust fund threatened liens and related labor problems if it continued to work in Palm Springs. During the dispute over the provisions, Local 11 removed its men from job sites in Los Angeles ostensibly for Community Electric's failure to make its monthly contributions and reports. Similar delays had occurred in the past without this response. Finally, Los Angeles NECA failed to represent Community Electric's interests at labor management meetings and participated in decisions harassing Community Electric.

This evidence at least gave Community Electric an arguable claim. *See, e.g., Los Angeles Memorial Coliseum Comm'n*, 726 F.2d at 1391 (requiring (1) an agreement (2) through which the parties intend to harm or restrain competition (3) that actually injures competition); *cf. Eliason Corp. v. National Sanitation Found.*, 614 F.2d 126, 129 (6th Cir.) (requiring evidence of discrimination or arbitrary exclusion), *cert. denied*, 449 U.S. 826 (1980).

The antitrust aspects of this case also affect our determination. We acknowledge the lenient evidentiary requirements for proving a conspiracy violating antitrust laws. Federal courts grant wide latitude in concluding conspiracy or collusion from parallel conduct and the inferences drawn from the circumstances. *See Monsanto Co. v. Spray-Rite Serv. Corp.*, 465 U.S. 752, 764 (1984) (fact finder may infer agreement from evidence that tends to exclude the possibility that entities acted independently).

We grant summary judgment less frequently in the antitrust context, in part because the alleged conspirators control the proof. *See Calnetics Corp. v. Volkswagen of Am., Inc.*, 532 F.2d 674, 683 (9th Cir.), *cert. denied*, 429 U.S. 940 (1976). This less demanding standard should also apply under Rule 11 to evaluate the associated documents.

2. *Response to the Statement of Uncontroverted Facts*

This paper addressed only factual questions. We review the court's denial of sanctions under a clearly erroneous standard. *Golden Eagle*, 801 F.2d at 1538. We find no evidence (and the defendants have indicated none) leaving us with a definite and firm conviction that the court committed a mistake. *See, e.g., Dollar Rent A Car of Washington, Inc. v. Travelers Indemnity Co.*, 774 F.2d 1371, 1374 (9th Cir. 1985).

CONCLUSION

The district court properly granted summary judgment in favor of the defendants and denied their motion for Rule 11 sanctions.

AFFIRMED.

APPENDIX C

NOT FOR PUBLICATION

UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

COMMUNITY ELECTRIC SERVICE OF LOS ANGELES, INC., *Plaintiff-Appellee,* vs. NATIONAL ELECTRICAL CONTRACTORS ASSOCIATION, INC., et al. *Defendants-Appellants,*	Nos. 87-6280, 88-5616 & 88-5663 DC# CV-86-0254-RSWL ORDER

(Filed April 27, 1989)

Before: WRIGHT, NORRIS, and WIGGINS, Circuit Judges.

The panel has voted unamiously to deny the petition for rehearing, and Judges Norris and Wiggins have voted to reject the suggestion for a rehearing en banc.

The full court has been advised of the suggestion for an en banc hearing, and no judge of the court has requested a vote on it. Fed. R. App. P. 35(b).

The petition for rehearing is denied and the suggestion for a rehearing en banc is rejected.

APPENDIX D

FOR PUBLICATION

UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

COMMUNITY ELECTRIC SERVICE OF LOS ANGELES, INC., *Plaintiff-Appellee,* vs. NATIONAL ELECTRICAL CONTRACTORS ASSOCIATION, INC., et al. *Defendants-Appellants,*	Nos. 87-6280, 88-5616 & 88-5663 DC# CV-86-0254-RSWL ORDER

(Filed May 10, 1989)

Before: WRIGHT, NORRIS, and WIGGINS, Circuit Judges.

The amended opinion filed April 27, 1989 is corrected to include Judge Wiggins special concurring opinion filed March 6, 1989 which was inadvertently omitted from the amended opinion.

APPENDIX E

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UNITED STATES DISTRICT COURT

CENTRAL DISTRICT OF CALIFORNIA

COMMUNITY ELECTRIC SERVICE OF LOS ANGELES, INC., *Plaintiff,* vs. NATIONAL ELECTRICAL CONTRACTOR'S ASSOCIATION, INC., etc., et al., *Defendants.*	No. CV 86-0254 WJR (Mcx) AFFIDAVIT OF DONALD L. MARTIN IN SUPPORT OF PLAINTIFF'S MEMORANDUM OF POINTS AND AUTHORITIES IN OPPOSITION TO DEFENDANTS' MOTIONS FOR SUMMARY JUDGMENT Date: May 18, 1987 Time: 10:00 a.m. Place: Courtroom of the Honorable William J. Rea

I, DONALD L. MARTIN, declare as follows:

1. I am an economist and Vice President at Glassman-Oliver Economic Consultants, Inc., Washington, D.C. I received my Ph.D. in Economics in 1969 from the University of California at Los Angeles. I received an M.B.A.

from the City University of New York in 1964, and a B.S. from Boston University in 1961.

2. My prior employment history as an economist is as follows. From 1980 to 1981, I was a Senior Consultant with National Economic Research Associates, Inc. From 1975 to 1980, I served as Research Professor of Economics at the Law and Economics Center, University of Miami Law School. From 1968 through 1975, I was an Assistant and Associate Professor of Economics in the Department of Economics at the University of Virginia.

3. In addition, I have held the following positions: Senior Advisor to the Reagan-Bush Transition Team on the Federal Trade Commission (1980); Adjunct Professor of Economics, Law and Economics Center, University of Miami (1980); Senior Economist, Network Inquiry Special Staff, Federal Communications Commission (1978-1980); Visiting Professor of Industrial Relations, Graduate School of Business, University of Chicago (1977); National Economics Fellow, Hoover Institution, Stanford University (1974); and National Science Foundation Grant Recipient, Erasmus University, Netherlands (1972).

4. I have also written numerous professional books and articles on labor unions, labor markets and antitrust topics. I have reviewed the *Vitae* attached to this affidavit and certify that it is true and correct.

5. My specific professional experience relevant to this matter includes expert witness preparation, testimony, depositions and affidavits in five antitrust cases involving market definition and other antitrust issues; testimony before the Joint Economic Committee of the

U.S. Congress on antitrust policy; professional publications concerning the measurement of monopoly power, consulting services supplied to the Federal Trade Commission relevant to investigations of union-antitrust matters; and extensive graduate teaching experience involving labor economics, industrial organization and antitrust economics.

6. In preparation for this affidavit, I reviewed descriptive and analytical material on the electrical contracting industry, declarations, affidavits, depositions and motions of the relevant parties, the Inside Wireman's Agreements of Local 440 over the period 1975-1986, and the Inside Wireman's Agreements of 24 other California IBEW locals. I also relied upon general principles of economics, and the economic literature on labor unions, industrial organization, and antitrust. My opinions and beliefs are based upon this information, and upon my background, experience and training as an economist.

I. *THE ECONOMICS OF ANTICOMPETITIVE UNIONS AND THE LABOR EXEMPTIONS*

7. Until relatively recently, much of the labor economics and industrial relations literature devoted to collective bargaining has characterized union-employer relationships as adversarial. However, there has been a growing interest among scholars and jurists in examining the shared circumstances and incentives that cause the parties to a collective agreement to engage in decidedly more cooperative behavior. Under certain conditions cooperation may be expressed in collective bargaining agreements that work to cartelize the product market.

Unions and their employers are in vertical relationship to one another. By adopting policies to maximize *joint* profits, they may enjoy gains unavailable from adversarial behavior. Such gains are then shared according to a formula embodied in the collective agreement.

8. The lessening of product market competition may take the forms of price fixing, market division, raising rivals' costs (non-price predation) or otherwise erecting entry barriers beneficial to those within them. In such circumstances consumers and certain competitors or potential competitors are harmed and resources are allocated inefficiently, thereby indirectly harming society as a whole.

9. Whatever the form, the cooperative cartel model implies that specific elements of the collective bargaining agreement (or, alternatively, specific elements of an informal understanding between labor and management) represent necessary conditions to the success of the parties' anticompetitive goals. In other words, without the cooperation of the union, employers would not be in a position to realize the fruits of anticompetitive behavior, other things the same.

10. Economic theory does not limit union complicity in anticompetitive outcomes in the product market to collusion between management and labor. It is well known and widely supported that under certain conditions unions may act *unilaterally,* but purposefully, to create anticompetitive conditions in the product markets in which they have collective bargaining agreements. The resulting monopoly rents may then be appropriated

through higher wage rates, fringe benefits, better working conditions or a combination of all three.

11. However, the more bargaining power possessed by employers (for example, through employer bargaining groups), the less chance the given union will have to realize all of the supra-competitive returns. Thus, organized bargaining power possessed by employers in the presence of union-derived restraints on competition in the product market will usually imply cooperation between both collective bargaining parties. Whether unilateral or not, restraints on competition in the product market harm consumers, misallocate resources and may exclude efficient competitors.

12. There are, of course, situations where unilateral action by a union may indirectly or even inadvertently create market power for employers in the product market, while it satisfies some other union interest. Employers may benefit from the phenomenon, but only at the expense of consumers and competitors who are disadvantaged in the process of entry.

13. Public policy toward labor unions is acknowledged in the labor exemptions (statutory and non-statutory) to the U.S. antitrust laws. Despite anticompetitive consequences, the public interest may be served by unions pursuing legitimate union goals. Thus, not all union behavior resulting in the lessening of competition in the product market, in the raising of prices to consumers or in competitive harm to given classes of firms has been subject to antitrust liability penalties. These labor exemptions reflect a presumption that the losses to society incurred from the sacrifice of competition are

more than compensated by the furthering of legitimate union goals, consistent with public policy.

14. It follows then that where such goals may be achieved *without* sacrificing competition and *without* additional costs of comparable magnitude, invoking and enforcing the labor exemptions are counter to the public interest. Society would be better off, in such circumstances, if unions were encouraged to adopt viable and less anticompetitive methods of achieving union goals. Withholding the labor exemption in such cases raises the costs of (otherwise avoidable) anticompetitive consequences and encourages the particular union and its employers to adopt practices more in line with public policy and the public interest.

II. *CONCLUSIONS*

15. If we apply the above models and public interest criteria to the evidence in this matter, the following conclusions may be drawn:

A. *Raising Entry Barriers and Dividing Markets*

16. Given the relevant markets identified below, Local 440's Inside Wireman's Agreement (1981-1982) with Southern Sierras NECA operates to raise entry barriers for non-local electrical contractors attempting to compete in Local 440's jurisdiction. The Agreement also operates to divide the Riverside County trading area among incumbent electrical contractors into smaller markets, each with its own entry barrier. These types of activities on their face virtually always have the effect of restricting

competition and decreasing output in the affected markets.

17. A principal function of Sections 2.07 and 2.08 of the Agreement is to operate as an entry barrier to all non-recognized contractors who wish to do business within 440's jurisdiction beyond the "free zone" surrounding the post office at Riverside City. New entrants responding quickly to a bid opportunity within the 440 jurisdiction face significantly higher costs because of Section 2.07 than do "recognized" local contractors located beyond the Riverside City "free zone." New entrants under less urgent time constraints also face higher costs in bidding a given job than do incumbent "recognized" shops. This follows because union recognition requires the rental or ownership, furnishment and manning of "permanent" premises at least 90 days before commencing work (and perhaps even before bidding work), often with no ready income to offset expenses.

18. Significantly, even though employees customarily are not dispatched to the job site from the employer's shop, Section 3.20 of the Agreement bases "subsistence" payments to employees on a formula that penalizes the employer as a function of the distance between the job site and the employer's permanent shop location. This rule functions as a market division scheme for electrical contractors operating within 440's jurisdiction. The market division scheme is furthered by a system of "free zones" that favor "local" shops over non-local shops situated within 440's jurisdiction. The market division scheme, by definition, creates barriers which effectively restrain *interdivisional* competition and is enforced by Section 2.07 discussed below.

B. *Labor-Management Committee Enforces the Anticompetitive Agreement*

19. When disputes arise, enforcement of Sections 2.07, 2.08 and 3.20 is the responsibility of a labor-management committee comprised of union representatives and incumbent electrical contractors who stand to gain by market division schemes, entry barriers and the raising of new rivals' costs. New entrants may face unit labor costs as much as 15 percent higher than incumbents' costs (based on estimates from "labor burden" calculations), which, at that margin, may mean the difference between winning and losing bids.

C. *Harm to Plaintiff*

20. The application of Sections 2.07, 2.08 and 3.20 of the Agreement has brought anticompetitive harm to the Plaintiff by significantly disadvantaging it in bidding on contracts in the Palm Springs area as well as other Riverside County areas, and ultimately causing it to withdraw from doing business within 440's jurisdiction.

D. *Harm to Competition*

21. Enforcement of Sections 2.07, 2.08 and 3.20 of the Agreement has suppressed competition in the market by discouraging entry in areas where barriers are higher (Palm Springs Desert area) relative to where barriers are less severe (e.g., within the Riverside "free zone"). It has also discouraged recognized contractors from entering areas beyond their free zone. Indeed, it has discouraged entry into the jurisdiction of Local 440 generally, to the

detriment of consumers of electrical contracting services who live and work there.

22. Based on my analysis of Inside Wireman's Agreements of all other IBEW locals in California, it is my judgment that legitimate union goals of employer recognition and subsistence payments to union members may be easily realized without the use of the anticompetitive clauses of Sections 2.07, 2.08 and 3.20 employed in the Agreement. Indeed, Local 440's new Inside Wireman's Agreement (1986-1989) is proof of this observation. As a result, I conclude that the 1981-1982 Agreement promoted anticompetitive effects beyond the public interest served by the labor exemptions.

III. *RELEVANT MATTERS*

23. The harm to competition and the Plaintiff occurred within the context of a relevant product market and a relevant geographic market.

A. *Relevant Product Market*

24. Electrical contracting services cover a wide variety of activities from the sale, installation and maintenance of electrical equipment in residential, commercial and industrial buildings to the supply and installation of traffic lights, street lamps and other public outdoor electrical operations. Although very large electrical contractors bid on both inside and outside jobs, more frequently contractors specialize their business to one or the other. Electrical contracting services may be sold *directly* to final

consumers or sold to general contractors under subcontracting arrangements. As a rule, other than very small jobs, electrical contracting services supplied to new residential, commercial and industrial construction projects are subcontracted by general contractors. Electrical subcontracting costs have been estimated to represent approximately 10 percent of the costs of projects associated with general contracting services.

25. "Open shop" general contracting did not become a significant phenomenon in Riverside County and contiguous county areas until after 1983. General contractors that were all non-union were also rare, outside of residential construction. Therefore, a general contractor, under union agreement with other trades, would face serious labor problems if it substituted a non-union electrical subcontractor for a union electrical subcontractor (i.e., a non-union shop for a union shop). Moreover, as mentioned above, electrical contracting represented a relatively small fraction of total construction costs. As a result, competition from non-union firms was not a significant threat to union shop electrical contractors in Riverside County and counties contiguous to it before 1984. This observation is consistent with the fact that 85 percent of the electrical contracting in the Palm Springs area in 1981 was under union contract (Thomas Brady Deposition, pp. 12-13). That statistic had dropped to between 50 and 40 percent by 1984 (Brady Deposition, pp. 12-13, a true and correct copy of which is attached as Exhibit 1.)

26. These considerations strongly suggest that the relevant product market for antitrust concerns is union shop electrical contracting services to union contractors on residential, commercial and industrial construction

projects. Residential electrical contracting requires fewer skills, less experience and perhaps a less substantial reputation than commercial and industrial electrical contracting. Therefore, there may be some justification in distinguishing residential electrical contracting from commercial/industrial electrical contracting services, the larger the size of the job. This distinction is made among electrical contractors, the IBEW and in statistical analyses of the electrical contracting industry compiled by sources such as NECA.

B. *Geographic Market*

27. Reference to contractor reporting services such as the *Dodge Daily Construction Reports* (McGraw Hill Publications), NECA surveys and the Fails Management Institute reveal that most electrical contractors do not leave the state where they are headquartered to do business. Moreover, a close examination of the *Dodge Daily Construction Reports* for 1981 shows that most electrical contractors bidding on jobs in, for example, the Orange County area (information was only available for public construction projects) were headquartered within the surrounding contiguous counties or thereby. These observations are consistent with descriptions of his search activities made by deponent John Gomes. "[W]e've been bidding in five counties for a 10 year period prior to '81 [and subsequently]." (Gomes Deposition, pp. 32-34, a true and correct copy of which is attached hereto as Exhibit 2.)

28. In the absence of the recognition and subsistence clauses of the Agreement discussed below, the relevant geographic market for antitrust purposes is not

likely to be greater than the contiguous counties surrounding Riverside County or Local 440's jurisdiction. However, with access to daily construction reporting services, excellent roads and an available supply of skilled labor, a small, but significant, non-transitory increase in competitive bid prices may reveal that the relevant geographic market includes most of Southern California. Nevertheless, examination of the *Dodge Reports* for counties closer to Riverside failed to reveal significant representation from more remote areas.

29. Further refinement is necessary once the *recognition* and *subsistence* clauses of the Agreement are introduced. The relevant market is artificially constrained in that electrical contractors domiciled within 440's jurisdiction may freely bid (except for San Bernardino County [Local 477 and Southern Sierras NECA's jurisdictions] where similar barriers apply) for jobs in other counties, but outsiders are burdened with an additional cost if they choose to perform any work outside of the Riverside "free zone." All other entrants to Local 440's jursidiction and to the area covered by Southern Sierras' NECA Riverside Division are burdened relative to incumbents. The effect is to create a separate geographic market for most of Riverside county.

30. As discussed above, subsistence burdens and recognition costs to outsiders can amount to approximately 15 percent of unit labor costs. A small, but significant, non-transitory increase in bid prices by contractors within the smaller market would not likely cause entry by those familiar with the Agreement. However, insulation from outside competition without a market division

or price fixing scheme does not protect locally-based electrical contractors from competition from within.

IV. *THE AGREEMENT SUBSTANTIALLY LESSENS COMPETITION IN LOCAL 440'S JURISDICTION*

A. *The Agreement's Anticompetitive Clauses*

31. The Inside Wireman's Agreement relevant to this matter is virtually identical, in topics covered, to the other 24 California Inside Wireman's Agreements I have studied. All discuss administrative procedures, employer and union rights, wages per hour a[illegible] working conditions, referral procedures, apprenticeship and training, fringe benefits and safety. However, only the Agreements with *Local 440* and *Local 477* (both signatories with Southern Sierra's NECA) contain employer recognition clauses and employee subsistence clauses that clearly and arbitrarily disadvantage new entrants to the union's jurisdiction, respectively. Moreover, only these two Agreements have clauses that effectively produce a mechanism for market division within the union's jurisdiction, respectively.

32. Section 2.07 of the NECA Inside Wireman's Agreement with Local 440 provides for the *recognition* of an employer's *permanent* place of business within the jurisdiction, as a *local* shop. Such recognized local shops are allowed certain pecuniary privileges, discussed below, vis-a-vis other recognized local shops located in other parts of the 440 jurisdiction and via-a-vis other employers with no actual *permanent* place of business within the jurisdiction. However, before these privileges

may be enjoyed, a new contractor must satisfy two criteria. First, he must be found in compliance with Section 2.08 of the Agreement containing the union's definition of a permanent place of business. Second, he must wait a "minimum of 90 days" before his new status is *recognized* by the union.

33. Section 2.07 makes it clear that should recognition be bestowed on the new contractor after he had commenced working on the job, all said pecuniary privileges will be denied, no matter how long that job continues. Subsequent deposition testimony by NECA representative Robert Shaw (Robert Shaw Deposition, pp. 103-104, a true and correct copy of which is attached as Exhibit 3) suggests that recognition bestowed after a job is *bid*, but before work is begun, also justifies the withholding of pecuniary privileges to the new contractor for the length of the job in progress.

34. No provision in the Agreement sets a limit on the number of days the union may take to *recognize* a new contract. Significant pecuniary privileges granted to recognized local shops, but denied to a newcomer for perhaps a substantial period of time, represents a differential cost advantage that any knowledgeable potential entrant would consider before entering the protected market. Those entrants without benefit of such knowledge may find the cost differential sufficiently onerous to quit the market.

35. The reality of Section 2.07 is its disincentive to would-be entrants and its penalties threatening those who would bid and undertake work before recognition. For those entrants who neither bid nor work before

receiving the union's recognition blessing, the "place of business" requirements of Section 2.08 ensure that for at least 90 days, and most likely more, newcomers are likely to incur overhead expenses without the benefit of offsetting revenues from electrical contracting sales in the local market. These costs are obviously not incurred by recognized incumbent shops bidding on current jobs.

36. Finally, Section 2.07 provides for the enforcement of the Agreement's "place of business" requirements of Section 2.08 and for its recognition process through its labor-management grievance procedure. Whatever else, this procedure is not designed to produce impartial results that might otherwise arise from disputes between new entrants and Local 440 over compliance with Section 2.08 or recognition. This is so because such disputes affect, in no small way, the private interests of incumbent recognized employers, including members of the management side of the committee itself. This surely constitutes a conflict of interest.

37. Should the members of Southern Sierras NECA's Labor-Management committee agree with the union in its withholding of recognition or in its judgment about a failure to comply with Section 2.08, it may avoid facing competition from a new entrant on equal terms. Where the new entrant may make a significant or aggressive competitor (as was the case in this matter) and the incumbent has significant market share to lose (as was also the case in this matter) incentives are strong to maintain the status quo. Moreover, pressure on the committee is also great from other incumbent recognized shops who may fear aggressive newcomers.

38. Holding aside the significance for legitimate union goals of the "place of business" requirements in Section 2.08 and the 90-day provisions and implied penalties of Section 2.07, aggressive competitors may make difficult adversaries in collective bargaining. Unions as institutions also have a conflict of interest in deciding on accepting new entrants. More employers may mean greater bargaining power for the union and perhaps more employment for its members. On the other hand, if some of the new entrants are too vigorous in their bargaining relative to incumbents who have invested in long-term associations with union officials, it may be prudent to find ways to protect existing relationships.

39. Section 2.08 of the Agreement deals with the criteria necessary to satisfy the unions' definition of a contractor's permanent place of business. Except for the Agreement between Local 477 and Southern Sierra's NECA, I found no other Inside Wireman's Agreement that was so detailed in specifying the required physical chacteristics of the premises, its contents and its operation. A premises is defined as a place where the employer can be reached by phone, receive personal calls and mail and where the employer conducts his ordinary business. Trailers, portable buildings and answering services or a post office box are not acceptable. In reading the deposition testimony of Thomas Brady (Brady Deposition, p. 70, a true and correct copy of which is attached hereto as Exhibit 4), we know that the union expects to see the conventional symbols of business activity (i.e., the presence of desks, files and telephones) when it inspects a new shop claiming compliance with Section 2.08. Unless compliance with these requirements is met, the union will

not begin the minimum 90-day waiting period before bestowing recognition.

40. Significantly more economical ways of setting up a business while waiting to be recognized by the union are discouraged. While many incumbent recognized electrical contractors operate their businesses out of their personal residences, a new entrant setting up shop in his mobile home presumably would not be in compliance with Section 2.08.

41. Although the union's demand that an employer maintain a permanent place of business before bestowing recognition may not seem unreasonable, two facts strongly question the requirements of Section 2.08 regarding relevance to legitimate union interests. First, deposition testimony by Leland Brand (pp. 21-23, a true and correct copy of which is attached hereto as Exhibit 5), reveals that he did not check to see whether recognized contractors' places of business *continued* to comply with Section 2.08 of the Inside Wireman's Agreement after recognition.

42. Second, from Section 3.20, discussed below, it is learned that an employer without a permanent shop in the jurisdiction will be assigned to the "free zone" at the City of Riverside *as if* he had a recognized shop there. Thus, for some new entrants the union has waived its stringent compliance requirements. Although these employers may operate out of a temporary facility (trailer or portable building) with no permanent mailing address or direct telephone connection to the outside world and with no visible symbols of conventional business activity, the union will dispatch workers to their job sites. Should

these employers happen to have job sites in and around the "free zone" of Riverside, they are afforded the same pecuniary benefits available to incumbent recognized emloyers [sic] there whose offices comply with Section 2.08.

43. On the other hand, should these emloyers [sic] have job sites elsewhere, they are penalized because they do not have offices that comply with Section 2.08. This suggests that the requirements of Section 2.08 are arbitrary and unnecessary to the realization of legitimate union goals.

44. An alternative and more appealing explanation for Section 2.08 is that it functions as a mechanism to raise the costs of entry to electrical contractors located outside Local 440's jurisdiction by penalizing the bidding on job sites other than in the Riverside vicinity.

45. Section 3.20 of the Agreement is a clause ostensibly providing for compensation to workers who must travel excessive distances to an employer's shop or job site. With regard to traveling to distant job sites, however, Section 3.20, together with Sections 2.07 and 2.08, functions to divide Local 440's jurisdiction, or the County of Riverside, among competing incumbent electrical contractors.

46. In fact, the Southern Sierras NECA Agreements with Locals 440 and 477 are the only California Agreements that operate as market division schemes. All but four Agreements that I examined had a travel clause establishing "free zones" within which workers traveling to job sites were not compensated by their employer.

47. Similarly, all but four Agreements provided for subsistence payments to workers traveling to job sites beyond the borders of said "free zones." In the case of Local 440, the Agreement establishes an 18-mile "free zone" radius and $.30 per mile subsistence to traveling workers beyond the "free zone" up to $35.00 per day, to be paid by the Employer.

48. However, *only the unions associated with the Southern Sierras NECA Chapter referenced the "free zone" and the attendant subsistence payment schedule exclusively to the location of the employer's shop relative to the job site* (See Appendix I).

49. In the case of Local 440, an 18-mile "free zone" was established at the post office of the town in which the recognized employer's shop is located. Job sites within 18 miles of that post office required no travel allowance. Sites beyond that were tithed accordingly. Thus, if an employer wished to bid jobs in several different places covering considerable distances from each other, he could use only one "free zone," the one based on the location of his recognized shop.

50. In order to avoid paying subsistence on all other jobs he might bid in other towns outside of his free zone but within Riverside County, the contractor would have to open up other shops that comply with Sections 2.07 and 2.08 of the Agreement. Therefore bidding on distant jobs was more expensive than bidding on jobs closer to his existing recognized shop. Maintaining many permanent shops around the county so that the employer might be ready should a bid opportunity arise is prohibitively expensive.

51. As a result, incumbent recognized shops are able to establish little fiefdoms relatively secure from the county-based competitors located elsewhere (not to mention new entrants to the county). This interpretation is consistent with deposition statements by Dennis Thorson. Mr. Thorson testified that he once considered setting up an office in Blythe (within Local 440's jurisdiction) in order to avoid the subsistence payments he would otherwise be obliged to make. (See Ex. 5a, Thorson depo., pp. 113-114.) Additionally, before the subsistence requirements were changed in 1986, Mr. Thorson bid most of his jobs within the Palm Springs "free zone" or as close to the "free zone" as possible (See Ex. 6, Thorson depo., p. 116.) Moreover, Mr. Thorson did not bid jobs in the City of Riverside because it was "far beyond" *his* free zone (See Ex. 7, Thorson depo. p. 119.) (See Appendix III.)

52. Rather than set up an additional office in the City of Riverside, John Gomes purchased an existing recognized shop there (Gomes Deposition, pp. 29-31; 57-58, a true and correct copy of which is attached hereto as Exhibit 8). Economic theory teaches that the price Gomes paid for that firm likely included the savings associated with operating in the "free zone" of Riverside rather than paying subsistence from his Palm Springs office. In other words, Mr. Gomes had to pay a premium just to enter a new market.

53. Other California IBEW locals provide for "free zones" and subsistence payments based on the relationship between the job site and a neutral references point that does not distinguish between incumbent employers and newcomers or where they are located. Instead, legitimate union interests are expressed in concern for the

distance workers must travel to job sites from the union hall, the post office or city hall of the town in which many of the memberships reside or the respective residences of the members.

54. In the case of IBEW Locals 332, 428 and 442, employer locations are used as reference points only where subsistence payments would be lower than the union's more neutral locations. In all cases, each employer may choose the reference point most suitable for him (See Appendix I).

55. When compared with the 23 other California IBEW locals, it becomes readily apparent that the Agreement containing Sections 2.07, 2.08 and 3.20 was overly broad in pursuing legitimate union interests. The anti-competitive effects it generated, together wtih [sic] the support of NECA members discussed more fully below, cannot be outweighed in this case by the public's interest in realizing our national labor policy. The same legitimate union interests covered in the Agreement have been secured by Local 440's sister organizations in their respective Agreements without the damage to competition, competitors and consumers that Sections 2.07, 2.08 and 3.20 have brought.

B. *The Agreement's Anticompetitive Effects*

56. As discussed above, deposition testimony by Dennis Thorson established that Sections 2.07, 2.08 and 3.20 were effective in restraining his bidding activity and, thus, competition within the jurisdiction of Local 440. The deposition of Thomas Brady (Ex. 9, Thomas Brady Depo.

pp. 25-35, 68-70.) reveals that new entrants such as Fishback and Moore, Swanson Electric, Morrow Medows and Amelco were denied recognition and forced to incur higher costs to bid and work jobs in Riverside County. Similarly, Community Electric was also subjected to costs higher than incumbents.

57. The above examples deal with firms who actually entered the market and found significant barriers to remaining as viable competitors. However, economic theory predicts that significant barriers to entry should also be expected to keep *potential* competitors out.

58. Evidence from NECA membership directories for the years 1977 through 1981 provide support for this prediction. As discussed above, a substantial amount of electrical contracting in the 440 jurisdiction (perhaps as much as 85 percent) was under union contract before 1982. Thus, new entrants to Riverside County before that date were likely to affiliate with NECA and Local 440 IBEW.

59. From the Agreement, it has been established that new entrants to the vicinity of the City of Riverside need not satisfy Sections 2.07 or 2.08 to qualify for "free zone" privileges in that community. New entrants and incumbent recognized shops were treated equally, at least with regard to subsistence payments and Section 3.20. Conversely, new entrants seeking to bid on jobs in the vicinity of Palm Springs were subject to the cost disadvantages associated with Sections 2.07, 2.08 and 3.20. These firms faced significantly higher entry barriers.

60. Reference to public data on bidding permits and construction valuations in Riverside County, and in particular in the vicinity of the City of Riverside and in the vicinity of Palm Springs, show that both areas grew rapidly between 1975 and 1981. In fact, residential, commercial and industrial new construction values in the City of Riverside environs' grew at a compound annual rate of 28.4 percent during that period. Similarly, Palm Springs environs' new construction values grew at a compound annual rate of 28.7 percent in the same period. While the City of Riverside had a much larger base on which to grow relative to Palm Springs, the absolute value of the increase in both areas was sufficient to attract new entry.

61. If NECA directories for 1977 through 1981 are consulted, entries under the Riverside Division of the Southern Sierras Chapter reveal evidence consistent with the anticompetitive effects discussed above. Appendix II below is a table that presents the percentage of NECA members, with Palm Springs vicinity and Riverside City vicinity addressess, that appeared in the directory for various numbers of consecutive years.

62. For example, Appendix II shows that, in 1979, 31 percent of NECA members were listed with Riverside addresses in no more than the last four consecutive years. In other words, 69 percent were listed as members for at least four or more consecutive years. On the other hand, in 1979, only 20 percent of NECA members with Palm Springs vicinity addresses were listed in no more than the last four consecutive years. This means that, in 1979, there were a greater percentage of newcomers in the Riverside City vicinity than in the Palm Springs vicinity. This is precisely what economic theory would predict,

since Palm Springs is subject to relatively higher entry barriers.

63. The relatively greater percentage of new entrants at Riverside City appears in every year except for 1978 at the two-year level. This result is strong evidence that Local 440's entry barriers were effective in restricting competition from potential entrants outside Riverside County and the "free zone" of the City of Riverside.

V. *COMPETITIVE HARM TO COMMUNITY ELECTRIC*

64. Like several other entrants before it, the Plaintiff, Community Electric, ran afoul of Sections 2.07, 2.08 and 3.20 of the Agreement. Although it was initially operating from a Palm Springs condominium residence with a mailing address and direct phone line, its status as a shop in compliance with Section 2.08 was always in question. By contrast, Dennis Thorson operated his shop from his residence for 20 years.

65. With its winning bid at the Indio Hospital, Community Electric demonstrated that it had entered the Palm Springs trading area as an aggressive competitor. Its bid, when compared to the runner-up, also demonstrated that incumbent competitors were accustomed to bidding much higher on comparable jobs.

66. As discussed above, the Agreement and the labor-management committee that enforced it, imposed differentially higher costs on competitors such as Community Electric, as part of a mechanism to keep entrants out and divide markets. Community Electric suffered

competitive harm in that recognition was never bestowed upon it, even though it tried to bid several jobs in the Palm Springs area. Liens assessed against it for back subsistence pay were used as signals to other general contractors that accepting or awarding Community electric a subcontract might bring with it other union problems. Consequently, the Plaintiff was deprived bid awards it might otherwise have received.

67. The market division scheme that operated through the practice of Sections 2.07, 2.08 and 3.20 prevented Community Electric from competing effectively in other parts of Riverside County outside the vicinity of the City of Riverside. This too brought competitive harm to the Plaintiff.

I declare under penalty of perjury that the foregoing is true and correct.

Executed on May 1, 1987, at Washington, D.C.

/s/ Donald L. Martin
Donald L. Martin

_____

(Notary Public)

My commission expires

_____

No. 89-186

IN THE

Supreme Court of the United States

OCTOBER TERM, 1989

COMMUNITY ELECTRIC SERVICE OF LOS ANGELES, INC.,
Petitioner,

v.

NATIONAL ELECTRICAL CONTRACTORS ASSOCIATION, INC., *et. al.*,
Respondents.

On Petition for Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

BRIEF IN OPPOSITION OF RESPONDENTS NATIONAL ELECTRICAL CONTRACTORS ASSOCIATION, INC., AND INTERNATIONAL BROTHERHOOD OF ELECTRICAL WORKERS, AFL-CIO

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BRIEF IN OPPOSITION OF RESPONDENTS NATIONAL ELECTRICAL CONTRACTORS ASSOCIATION, INC., AND INTERNATIONAL BROTHERHOOD OF ELECTRICAL WORKERS, AFL-CIO

STATEMENT OF THE CASE [1]

Petitioner, Community Electric Service of Los Angeles, Inc., ("CES"), was organized as a corporation under the laws of the State of California in December, 1976.

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[1] The opinion and orders of the court of appeals are set out in the petition for a writ of *certiorari* and the district court's unreported order granting summary judgment, entered August 6, 1987, and its judgment entered on that same date is set out in brief in opposition of respondents Southern Sierras Chapter, National Electrical Contractors Association, *et al.* The relevant statutory provisions are reprinted in part in the *certiorari* petition and in that brief in opposition.

As provided for in California Revenue and Taxation Code, §§ 23301 & 23303, CES's corporate powers, rights and privileges were suspended for non-payment of its corporate franchise taxes in July, 1983. Under California law, by virtue of such suspension, CES did not have the capacity to sue or be sued at the time CES filed its federal anti-trust complaint in this case in January, 1986 alleging violations of the federal anti-trust laws, the Racketeer Influenced and Corrupt Organizations Act and related California laws. *See* Appendix To The Petition For A Writ of Certiorari (hereinafter "Pet. App.") at pp. 32-33, 35-36.[2]

The respondents, in their answer to the complaint, alleged that CES lacked the capacity to sue. CES, nevertheless, took no action until June, 1987 to have the California Tax Franchise Board issue a certificate of revivor reinstating CES's corporate powers for the purpose of pursuing this litigation. That revivor was, in fact, issued in June, 1987. By that time, the four year statute of limitations on CES's anti-trust claims had run. *See* Pet. App. 33.

The district court granted summary judgment in favor of the respondents on the ground that CES lacked capacity to commence this action under Fed. R. Civ. Proc. 17(b) and that CES did not regain the capacity to sue in federal court until after the statute of limitations expired on all of the claims asserted in the complaint. *See* Pet. App. 3. The court of appeals affirmed both the hold-

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[2] While not directly relevant for the present purposes, CES' complaint challenged the legitimacy of the travel/subsistence pay provisions of the multi-employer collective bargaining agreement between International Brotherhood of Electrical Workers Local 440 and the Southern Sierras Chapter, National Electrical Contractors Association. In essence, these provisions required a signatory employer who was working under the agreement at a stated distance from the employer's principal place of business, to make a daily travel/subsistence payment of $35 to each of its electrician employees. *See* Pet. App. 32.

ing and rationale of the district court. *See* Pet. App. 34-41.

ARGUMENT

The decision below is plainly correct. There are no contrary court of appeals decisions. The *certiorari* petition should therefore be denied.

1. Fed. R. Civ. Proc. 17(b) states "The capacity of a corporation to sue or be sued shall be determined by the law under which it was organized."

It is undisputed that petitioner CES was organized as a corporation under California law. It is also undisputed that as a matter of California law, CES—as an entity whose rights, powers and privileges as a corporation had been suspended by California—did *not* have the "capacity . . . to sue" at the time the instant suit was brought. Pet. App. 35-36, and that the reinstatement of those rights, powers and privileges after the applicable statute of limitations had run does "not validate retroactively the earlier filing," Pet. App. 36. In other words, California law provides that petitioner, CES, as a California corporation, had *no* "capacity" to bring or to maintain this suit at any relevant time within the applicable limitations period.

The court of appeals concluded that in these circumstances it follows directly from Fed. R. Civ. Proc. 17(b)'s plain language that this suit was properly dismissed. That court cited other court of appeals decisions reaching the same result on the same reasoning. Pet. App. 35 citing *Moore v. Matthew's Book Co.*, 597 F.2d 645, 646-47 (8th Cir. 1979); *R.V. McGinnis Theatres v. Video Indep. Theatres, Inc.*, 386 F.2d 592, 593-95 (10th Cir. 1967), *cert. denied*, 390 U.S. 1014 (1968). Petitioner cites *no* court of appeals case to the contrary and so far as we are aware there are *no* such cases.

Rather, petitioner argues that the California law in question is an "aberrant" or "hostile" state law that

poses a "significant threat" to the policies of the federal anti-trust laws and can, on that ground, be ignored in this federal lawsuit. Petition For A Writ of *Certiorari* (hereinafter "Pet.") at pp. 6-10 citing *Burks v. Lasker*, 441 U.S. 471, 479 (1979) (In *Burks*, the Court—recognizing that "[c]orporations are creatures of state law" and that "in this field congressional legislation is generally enacted against the background of existing state law", 441 U.S. at 478—*followed* state corporation law.)

There is, of course, no reason to believe that a state will regulate the right to sue of the corporations *the state itself charters* in a "hostile" manner. Fed. R. Civ. Proc. 17(b) therefore properly proceeds on the premise that it is appropriate to look to the law of the incorporating state in determining a corporation's capacity to bring a federal suit in federal court rather than to embark on the enterprise of creating a judge-made federal law of corporate capacity.[3] That Rule thus establishes that the

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[3] CES's claim, Pet. 7, that it was unable to meet California's legal requirements because of the alleged anti-trust violation here is not worthy of credence. Petitioner's "proof" of its anti-trust claim is exclusively contained in an *affidavit* of its so-called expert, Donald Martin. *See* Pet. App. 55-79. The affidavit demonstrates that Mr. Martin's expertise in labor relations is thin.

Mr. Martin failed to note, for example, that CES never sought to negotiate a separate agreement with respondent IBEW Local 440 but instead voluntarily agreed to be bound by the multi-employer area collective bargaining agreement. He further fails to note the uncontroverted evidence that the local employer association has resisted the subsistence pay provisions of the agreement for years and has been able to reduce their impact during collective bargaining.

The contention, completely unaccompanied by any factual or statistical analysis, that the travel/subsistence pay provisions have significantly disadvantaged CES cannot be squared with the facts. The total amount of subsistence payments paid by CES was barely over $20,000. The only contract covered by the area agreement CES bid was for $645,000 and CES was the low bidder by $269,000. It

California law challenged here is not the type of "aberrant" or "hostile" state corporation law that the federal courts are to ignore in federal statutory cases.[4]

2. The court of appeals responded to CES's due process claim, Pet. 12-14, as follows:

> Community Electric argues that the suspension of its corporate powers without actual notice resulted in a taking of its property without due process. It raised the question below in two lines of a lengthy brief without argument or citation to authority.

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does not take much economic analysis or anti-trust expertise to determine that if petitioner suffered economic harm, it was not due to the subsistence payments but rather to its overly low bid.

[4] Lacking any judicial auhority in point, CES ventures the suggestion that "Leading commentators on the Federal Rules *appear* to treat Rule 17(b)'s directive as applying only in those actions brought under a federal court's diversity powers." Pet. 9 (emphasis added) *citing* 6 Wright & Miller, *Federal Practice and Procedure*, 1561, p. 735 (1971) and 3A *Moore's Federal Practice*, § 17.21, p. 17-174 (2d ed. 1989). Petitioner misreads the cited secondary authority.

As we have seen, Fed. R. Civ. Proc. 17(b) deals with the source of law—the law of the state of incorporation—to be referred to in determining a corporation's capacity to bring its own lawsuits in its own name. The cited treatise sections, in contrast, deal with the law to be applied: (a) in cases in which the applicable federal law grants the *Federal Government* the right to bring a suit in the Government's own name for and on behalf of a corporation; and (b) in cases in which a state law restricting the right of *foreign corporation* (*viz.*, corporations chartered by another state) to bring suit is invoked.

These are questions that Fed. R. Civ. Proc. 17(b) does *not* purport to decide. And these are questions that raise qualitatively different federalism issues than the sole question presented here. There is plainly far greater reason to create federal law to define the Federal Government's capacity to sue than to define a private corporation's capacity to sue. Moreover, there are reasons to be chary of adopting, as federal law, rules a state creates to govern foreign corporations that have no application to state rules created to govern domestic corporations.

> Since the court never ruled on it and we have no developed record to review, we decline to address the question. We have discretion to determine what questions to consider and resolve for the first time on appeal. [Pet. App. 40.]

This eminently reasonable fact-specific determination that a particular litigant has not adequately preserved a constitutional contention plainly does *not* generate a question worthy of this Court's plenary consideration.

3. This Court has repeatedly held that where an agreement between employers and a union is claimed to violate the anti-trust laws, the National Labor Relations Board does *not* have primary jurisdiction over such labor law issues as must be decided in adjudicating the anti-trust claim. "[T]he federal courts may decide labor law questions that emerge as collateral issues in suits brought under independent federal remedies, including the anti-trust laws." *Connell Co. v. Plumbers & Steamfitters*, 421 U.S. 616, 626 (1975) (footnote omitted). *Kaiser Steel Corp. v. Mullens*, 455 U.S. 72, 83-86 (1982) (quoting and following *Connell*).

Against this background, the court of appeals refused to "extend the equitable tolling of *Mt. Hood Stages, Inc. v. Greyhound Corp.*, 616 F.2d 394 (9th Cir.), *cert. denied*, 449 U.S. 831 (1980), to this case," Pet. App. 39, since that decision "rested on considerations of federal policy and primary jurisdiction not present here," *id.*[5]

In *Mt. Hood Stages*, the court of appeals carefully considered such cases as *Ricci v. Chicago Mercantile Exchange*, 409 U.S. 289 (1973), heavily relied on by peti-

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[5] None of the respondents, except IBEW Local 440, were parties to the NLRB proceeding claimed to toll the statute of limitations here. That being so, the tolling argument, even if meritorious, cannot possibly apply to any respondent except Local 440. CES fails to address this point in its tolling discussion or even to bring this fact to the Court's attention.

tioner here, Pet. 16, as well as such cases as *Johnson v. Railway Express Agency, Inc.*, 421 U.S. 454 (1975), that state the limits of the tolling doctrine.[6] The *Mt. Hood Stages* decision holds that in federal anti-trust cases, "the doctrine of primary jurisdiction provides the 'relevant federal procedural law to guide the decision to toll the limitations period.'" 616 F.2d at 403 quoting *Johnson v. Railway Express*, 421 U.S. at 466.

On this aspect of this case, CES points to *no* contrary decision of this Court or of any court of appeals. That is not surprising for the Ninth Circuit law in this regard is a careful and faithful application of this Court's precedents.

In the final analysis, then, CES's equitable tolling argument, *see* Pet. 16-17, is nothing more than a reiteration of petitioner's argument, rejected below, that *Mt. Hood Stages* is inconsistent with *Ricci*. In making that argument, petitioner simply ignores both this Court's post-*Ricci* tolling decisions, such as *Johnson v. Railway Express*, and this Court's labor anti-trust decisions, such as *Connell*.

That being so, the court of appeals rejection of petitioners' position raises no question worthy of this Court's consideration.

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[6] In *Johnson v. Railway Express*, this Court rejected the contention that a potential plaintiff's civil rights claim under 42 U.S.C. § 1981 should be tolled while he pursues a Title VII of the Civil Rights Act of 1964 charge administratively before the Equal Employment Opportunity Commission. CES's position here is much weaker than the position of its counterpart in *Johnson* since (a) the administrative proceeding it claims should serve to toll the limitations period was not brought by petitioner but by one of the respondents and (b) the petitioner, in stark contrast to the civil rights litigant who is frequently unrepresented until he reaches the Federal courthouse door, was represented by counsel throughout the period in question.

CONCLUSION

For the above-stated reasons, the petition for a writ of *certiorari* should be denied.

Respectfully submitted,

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ON PETITION FOR WRIT OF CERTIORARI TO THE
UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

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Respondents.

RESPONDENTS' BRIEF IN OPPOSITION

The respondents identified hereinafter respectfully request that this Court deny the petition for writ of certiorari seeking review of the Ninth Circuit's judgment in this case, reported at 869 F.2d 1235.[1]

DECISIONS BELOW

The petition attaches the relevant opinion and other orders of the Court of Appeals, but not of the district

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[1]This Brief in Opposition is submitted on behalf of seven of the nine defendants in the proceedings below. Two defendants will be filing a separate brief.

court. Accordingly, the district court's order granting summary judgment, entered August 6, 1987, is set out in Appendix A to this brief. The judgment entered on that same date is set out in Appendix B.

STATUTORY PROVISIONS INVOLVED

The petition does not set out all of the California statutory provisions which are pertinent to the Questions Presented. California Revenue and Taxation Code, sections 23301, 23303, 23305, 23305a and 23305b are set forth in Appendix C to this brief.

STATEMENT OF THE CASE

These respondents believe a more complete statement of the case is necessary because petitioner's statement is inaccurate, incomplete and misleading.

A. Nature of Action and Proceedings Below.

The petitioner and plaintiff below, Community Electric Service of Los Angeles, Inc. ("CES"), commenced the instant action on January 13, 1986, suing all of the respondents for alleged violations of the Sherman Act (15 U.S.C. §§1, 2), along with various other claims. [Complaint, CR 1]

CES was organized as a corporation under the laws of the State of California in 1976. [Petition, p.4] At the time the complaint was filed, CES's corporate powers, rights and privileges had been suspended continuously since July 1, 1983, in accordance with California Revenue and Taxation Code, §§23301 and 23303 [Appendix, pp.A3,C1], for non payment of corporate franchise taxes. By virtue of such suspension, CES did not have the capacity to sue or be sued under California law when it filed this action. Accordingly, under the express provisions of Rule 17(b) of the Federal Rules

of Civil Procedure, CES also lacked capacity to sue in federal court. [Pet., pp. App. 33-36][2]

In their answers to the complaint, filed in March and April, 1986, respondents specifically alleged CES's lack of capacity to sue. [Pet., p. App. 33; CR 4-7, 10]

In mid-April 1987, respondents filed motions for summary judgment attacking all of CES's claims *on the merits*. [CR 25-39, 43-46] On June 8, 1987, prior to the scheduled hearing on their motions, respondents filed a request for a status conference with the court, wherein they advised that an issue regarding the statute of limitations had arisen, as well as CES's lack of capacity. This was due to the fact that the four year statute of limitations on CES's antitrust claims expired on May 6, 1987, and California law did not allow CES to obtain a retroactive reinstatement of its right to sue under such circumstances. Respondents inquired as to whether the court wished to take up the capacity/statute of limitations issues with the summary judgment motions already pending, or as a separate matter. [CR 81]

On June 8, 1987, the same day respondents requested the status conference, CES obtained a "certificate of revivor" from the California Franchise Tax Board, reinstating its corporate capacity to sue pursuant to California Revenue and Taxation Code section 23305b, "without full payment of back taxes." [Pet., p. 5, n. 1]

At the subsequent status conference, held June 15, 1987, the district court elected to take up the capacity/statute of limitations issue prior to the pending motions

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[2]The relevant provision of FRCP 17(b) reads: "The capacity of a corporation to sue or be sued shall be determined by the law under which it was organized."

for summary judgment on the merits. After permitting briefing of the issue, the court granted summary judgment in favor of respondents on the ground that CES lacked capacity to commence this action under FRCP 17(b) and did not acquire capacity to sue in federal court until after the statute of limitations expired on all of the claims asserted in the complaint. Since the reinstatement of CES's corporate powers on June 8, 1987 was *not retroactive* under California law, CES's claims were necessarily barred by the statute of limitations. [See Appendices A and B.]

The Court of Appeals affirmed both the holding and rationale of the district court. [Pet., Appendix B.][3]

Thus, while it is true CES *initially* lost its capacity to sue because of non payment of its California taxes, it was not that event which ultimately caused CES to be barred from pursuing its federal antitrust claim. *CES did not have to pay those back taxes to revive its capacity* under the procedure afforded by section 23305b. [See Appendix C, p.C3.] CES had ample time to do exactly what it did on June 8, 1987, *before* it filed its complaint on January 13, 1986, or at any time thereafter prior to May 6, 1987. It is beyond dispute that had CES done so, its antitrust claims would not have been time barred.

The petition offers no explanation as to why CES did not act in timely fashion to obtain the revived capacity needed to pursue this action. CES's corporate powers were suspended for two and one half years before the complaint was filed. The petition asserts that its

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[3]The petition does not challenge the correctness of the Court of Appeals' holding that CES's belated reinstatement of corporate capacity was not retroactive under California law. Nor would that have been an appropriate issue for review by this Court.

suspension was "unbeknownst to CES" [Petition, p. 5], but does not mention the fact that respondents pled CES's lack of capacity in their answers to the complaint. CES simply ignored that expressly alleged affirmative defense for some *fifteen months*, and has no one to blame but itself that it failed to act soon enough to prevent its suit from becoming time barred.

B. Background To Lawsuit And Relationship Of Parties.

In 1981, when the events giving rise to this lawsuit began, CES carried on an electrical contracting business, primarily in the County of Los Angeles, California. CES operated as a "union contractor" and was bound by the then current collective bargaining agreement between two of the respondents, Los Angeles County Chapter, National Electrical Contractors Association ("LA NECA") and International Brotherhood of Electrical Workers, Local Union No. 11 ("Local 11"). CES was a member of LA NECA. [SUF, CR 32, ¶¶8-10][4]

In mid 1981, CES decided to open a second office in the City of Palm Springs, California, located in the

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[4]The citation "SUF, CR 32" used herein, refers to a comprehensive "Statement of Uncontroverted Facts," submitted by several of these respondents to the district court in support of their motions for summary judgment on the merits. It was identified in the Clerk's Record on Appeal by its number on the docket sheet, 32. In accordance with the district court's local rules, each statement of fact set forth therein was fully supported by references to competent, probative evidence submitted with the motions, consisting of documents, unrefuted declarations of respondents' witnesses and sworn deposition testimony and other admissions of CES's principal officers. Most of said statements were expressly *admitted* by CES, in whole or in part, in the response which it filed. [CR 49] In any event, CES offered no competent, probative evidence to refute *any* of said statements.

County of Riverside. On June 22, 1981, it signed a lease for office space in Palm Springs to commence on August 1, 1981. [Complaint, CR 1, ¶21(c)] On July 28, 1981, CES signed a "Letter of Assent" agreeing to be bound as a signatory employer under the then current collective bargaining agreement between respondents, Southern Sierras Chapter National Electrical Contractors Association ("SS NECA") and International Brotherhood of Electrical Workers Local Union No. 440 ("Local 440"). At the same time, CES joined SS NECA as a member. [SUF, CR 32, ¶¶13-16][5]

Respondent, Southern California IBEW-NECA Pension Trust Fund ("Pension Trust Fund"), is a joint employer-employee managed employee benefit trust established in conformity with the provisions and requirements of the Labor Management Relations Act of 1947 ("LMRA"), as amended, and the Employee Retirement Income Security Act of 1974 ("ERISA"). It receives and administers contributions required to be made by employers for the purpose of providing retirement benefits for their employees under the terms of various collective bargaining agreements. [SUF, CR 32, ¶¶6, 7] CES was obligated under the LA NECA/Local 11 and SS NECA/Local 440 collective bargaining agreements to make contributions to the Pension Trust

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[5]Respondent, National Electrical Contractors Association, Inc. ("National NECA"), is a national trade association of electrical contractors. Respondents, LA NECA and SS NECA, are chartered chapters of that association, but each is a separate corporation and there is no common ownership interest among the three entities. [SUF, CR 32, ¶¶1, 5] Respondent, International Brotherhood of Electrical Workers AFL-CIO ("IBEW"), is an International Labor Union. Respondents, Local 11 and Local 440, are two of its local unions, but each is an autonomous entity. [CR 39, ¶¶2-4] National NECA and IBEW are jointly filing a separate Brief in Opposition.

Fund on behalf of its employees. [SUF, CR 32, ¶¶58-60, 62]

During the period in question, respondent, John Gomes, was a shareholder and officer of a corporation known as Industrial Electric, Inc., which was engaged in the electrical contracting business. Industrial was a member of SS NECA and its principal office was in Palm Springs. [SUF, CR 32, ¶3] Respondent, Dennis Thorson, was a shareholder and officer of a corporation known as Thorson Electric Inc., which was in the electrical contracting business and a member of SS NECA. Thorson Electric's office was located in Desert Hot Springs, California, in the County of Riverside. [SUF, CR 32, ¶4]

Under the terms of the SS NECA/Local 440 collective bargaining agreement, any disputes between signatory employers and Local 440 arising under the agreement were required to be arbitrated before a Labor-Management Committee consisting of three members representing the union and three representing employers. Gomes and Thorson frequently served as employer representatives on the Labor-Management Committee, and did so when the hereinafter described dispute between CES and Local 440 was arbitrated in 1982. [SUF, CR 32, ¶35]

C. There Is No Factual Support For CES's Claims That It Was Driven Out Of Business By Illegal Antitrust Conduct, And Thereby Denied Access To The Federal Court.

Of the three Questions Presented in the petition, the first two necessarily rest on the following premises: (1) that respondents' conduct complained of in fact violated the antitrust laws; and (2) that it was such "illegal

antitrust conduct" that drove CES out of business and caused it to have its corporate powers (including the right to sue) suspended by the State of California for non payment of taxes. From these premises, CES argues that the Ninth Circuit's application of California law to determine that CES lacked capacity to bring this action under Rule 17(b) had the effect of depriving CES "of its constitutional right of access to federal court," thereby permitting respondents "to use their own illegal conduct to shield themselves from Sherman Act liability." [Petition, Questions 1, 2; pp. 4-7, 11-12, 14]

As we will demonstrate hereinafter, the premises to CES's contentions in the petition are not supported by any facts established by competent evidence in the record below. None of the respondents violated the Sherman Act or any other federal or state law. More importantly, insofar as the issues CES seeks to present to this Court are concerned, there is not a shred of evidence to support CES's bare, conclusory allegation that it was driven out of business and rendered unable to pay its taxes as the proximate result of respondents' conduct.

1. The Provisions of The SS NECA/Local 440 Collective Bargaining Agreement Pertinent To The Dispute.

CES's antitrust claims rested on the contention that the collective bargaining agreement between SS NECA and Local 440 "operated as a barrier to entry" into the Palm Springs electrical contracting market. [Petition, p. 4] Hence, some discussion of the pertinent provisions of the agreement would seem to be helpful to an

understanding of this essential factual predicate to CES's grounds for requesting certiorari.[6]

Under the terms of the agreement, every signatory employer who had a "permanent place of business' within the jurisdiction of Local 440 (all of Riverside County) was given an 18 mile radius "free zone" around the main post office in the city in which the employer's place of business was located. A signatory employer who did not have a "permanent place of business" in the county was classified as a "traveling contractor." Traveling contractors also were given a comparable free zone, but since, by definition, they had no "permanent place of business" in the county, the center of their free zone was deemed to be the main post office in the City of Riverside. That city was the situs of Local 440's principal office and hiring hall, and a majority of its members resided there. *All* signatory employers were required to pay "travel" or "subsistence" pay to their employees, in addition to regular wages, on any jobs located outside of their free zone. If the distance from the perimeter of the free zone to the job site reached a certain maximum, the job was classified as a "subsistence job" and a flat $35 per day was required as "subsistence pay"

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[6]The petition does not discuss the provisions of the agreement at all, but instead cites to an affidavit of Donald L. Martin, an economist hired by CES to serve as an "expert." His affidavit was submitted in opposition to the respondents' motions for summary judgment on the merits. [CR 58] However, a cursory reading of the affidavit will quickly reveal that Mr. Martin's "market exclusion" theory was based solely on conjecture and generalizations. He conveniently ignored the specific uncontroverted facts discussed herein, including the actual provisions of the subject agreement.

for all employees. [SUF, CR 32, ¶¶17-19, 29; Agreement, §§2.07-2.09, 3.20, 3.21][7]

Under Section 2.08 of the agreement, a "place of business" was defined to mean "an office, shop or premises where the Employer or his designated representative can normally be reached by telephone and by personal call, and where the Employer receives his mail and conducts the ordinary tasks of operating his business." Under Section 2.07, when a "place of business" (also called a "shop") was established within Local 440's jurisdiction, it had to be *specifically recognized* as such by Local 440, and a *90 day minimum period* was expressly required for such recognition. Any dispute between the employer and Local 440 over the latter's refusal to recognize a place of business as a qualified "shop" was expressly made subject to the grievance and dispute resolution procedures set forth in the agreement—i.e., they were to be arbitrated before a Labor-Management Committee. [SUF, CR 32, ¶¶17, 32]

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[7]Respondents supported their motions for summary judgment on the merits with unrefuted evidence that travel and subsistence pay provisions similar to those described above, based on the "free zone" concept, had been in the Local 440 collective bargaining agreement for more than 20 years prior to the period in question. Over the years, SS NECA repeatedly had tried—without success—to bargain them out of the agreement, because the local electrical contractors in Riverside County did not work only in their limited free zones and they disliked having to pay extra compensation to employees on jobs located only a few miles away from their shops. [SUF, CR 32, ¶¶20, 83-92]

2. CES's Dispute With Local 440 Over The Timing Of Shop Recognition And The Decision Of The Labor-Management Committee Favoring The Union.

At the time CES became bound by the SS NECA/ Local 440 collective bargaining agreement on July 28, 1981, it already had successfully bid on a subcontract to perform electrical construction work on a project at the Indio Community Hospital in the City of Indio, a few miles from Palm Springs, and had executed a lease for its Palm Springs office. CES expected to begin the job in November and in fact started work on November 2, 1981. [SUF, CR 32, ¶¶22, 28]

It is undisputed that if CES had in fact established a qualifed "place of business" at the Palm Springs office location on August 1, 1981, the date its lease commenced, it would have met the requirements to be recognized as a local contractor with a "permanent place of business" in Palm Springs at the time work commenced on the hospital job. In that event, the job would not have been classified as a "subsistence job" *and CES would not have had to pay any subsistence pay to its employees.* [SUF, CR32, ¶¶29-31] Indeed, CES's complaint *admits* as much. [CR 1, ¶¶21(g), (h), (j).]

The genesis of this lawsuit was the dispute which arose when Local 440 contested CES's claim that it had begun using its Palm Springs office as a "shop" in time to be classified as a local contractor for the Indio Hospital job. Local 440 contended that as late as October 1981, CES still had not physically moved in, nor even installed a telephone, to establish a true "place of business" at that location within the meaning of the agreement. Local 440 refused to recognize the office as one which satisfied

the 90 day requirement when work began on the hospital job. This mean CES's free zone was required to be measured from the main post office in the City of Riverside, which was far enough away from Indio that the job had to be classified as a "subsistence job." Hence, the union insisted that CES pay its employees $35 per day for "subsistence," in addition to their regular hourly wages, for the duration of the job. [SUF, CR 32, ¶¶29-33][8]

After CES brought a grievance against Local 440 concerning the office timing issue, on March 16, 1982 the Labor-Management Committee (which included respondents Gomes and Thorson) upheld the union's contention that CES had not actually moved into the Palm Springs office before October 6, 1981, and hence that the Indio Hospital job was properly classified as a subsistence job under the agreement. [SUF, CR 32, ¶¶33-36]

CES did not accept the decision of the Labor-Management Committee, however. CES paid the required subsistence pay to its employees on the Indio Hospital job only until July 28, 1982, at which time it ceased making any further subsistence payments on the advice of its labor relations consultant. [SUF, CR 32, ¶37] This led to the NLRB litigation which is the subject of the third Question Presented in the petition. The petition does not describe it accurately. [Petition, pp. 15-16]

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[8]Under the agreement, once a job was classified as a "subsistence job," it was required to remain so classified until it was completed. [SUF, CR 32, ¶30]

3. The NLRB Decision Upholding Both The Union's Position and The Good Faith of The Labor-Management Committee.

The NLRB litigation was commenced on October 29, 1982, after Local 440 filed an unfair labor practice charge with the NLRB, alleging that CES violated Sections 8(a)(1) and (5) of the National Labor Relations Act (NLRA) by unilaterally ceasing to pay subsistence to employees on the Indio Hospital job, and by further refusing to bargain with Local 440 on that subject, in violation of the terms of their collective bargaining agreement. [SUF, CR 32, ¶¶44, 50]

The Administrative Law Judge ("ALJ") who heard the evidence made certain *key findings of fact adverse to CES* which are not mentioned in the petition, for obvious reasons. Thus, the ALJ expressly found: (a) that Local 440, *in good faith,* had concluded that CES's Palm Springs shop had not been timely established in relation to the Indio Hospital job under the collective bargaining agreement; (b) that the Labor-Management Committee, *in good faith,* had agreed with the union's position; (c) that, *in fact,* CES did not move into the office, or have a telephone in the office, until on or about October 6, 1981, and hence "did not occupy the office until some time in October 1981," i.e., less than 30 days prior to starting the Indio Hospital job; and (d) that the union had agreed CES's office was properly established for 90 days *by January 1982.* [SUF, CR 32, ¶¶52, 53; 271 NLRB 604]

Notwithstanding these factual determinations, the ALJ ruled against Local 440 on the unfair labor practice charges. He did so on the theory that CES did not violate the NLRA when it unilaterally ceased making subsist-

ence payments because those pay provisions of the agreement did not constitute a "mandatory subject of bargaining" under the NLRA. On appeal, however, the NLRB review panel *expressly reversed the ALJ on that point.* The NLRB held that such provisions called for the payment of supplemental "wages" within the meaning of the NLRA and, hence, they were not only valid, but a mandatory subject of bargaining under the NLRA. [SUF, CR 32, ¶¶54-55; 271 NLRB 599-601]

4. CES Was Not Excluded From Competition In The Palm Springs Market, Nor Was It Driven Out Of Business By Any Of The Respondents.

From the foregoing facts, it is absolutely clear that CES and its "expert," Mr. Martin, have grossly mischaracterized both the purpose and actual economic effect of the SS NECA/Local 440 collective bargaining agreement. On their face, the provisions of the agreement could not operate to exclude CES or any other new contractor from competing for business anywhere in Riverside County. *All* signatory contractors were required to pay travel or subsistence pay on jobs outside their free zones. A "traveling contractor" was treated *exactly like a local contractor* whose permanent place of business was in the City of Riverside (the biggest city in the county and situs of Local 440's office), since both had *exactly the same free zone.* Moreover, a "traveling contractor" who did not wish to have his free zone based on the main post office in the City of Riverside was free to open an office anywhere else in the county and become a "local contractor" in only 90 days.

Indeed, this entire costly lawsuit stems from the fact that CES had to pay subsistence pay to its employees

on a *single job,* which easily could have been avoided if it had simply moved into its Palm Springs office on August 1, 1981, when its lease commenced. CES never contended that it would have been unduly burdensome to do so. Rather, it insisted from the very beginning that it *did* move in on that date, though the Labor-Management Committee, ALJ and NLRB all found otherwise from the evidence presented.

Furthermore, CES's own records showed that the *total* amount of subsistence it actually paid to its employees on the Indio Hospital job, up to the time it permanently ceased making such payments, was *only $20,370.* [SUF, CR 32, ¶¶37, 99][9] CES's records and the deposition testimony of one of its officers also proved conclusively that even if it had included subsistence pay in its bid on the Indio Hospital job, it still would have been the low bidder by a *wide margin.* Based on CES's estimate of the number of hours required to perform the job, the total amount it would have included as subsistence pay in calculating its bid would have been a *mere $27,688.* [SUF, CR 32, ¶¶94-98] CES obtained that job with a low bid of $645,000, which was *$269,000 below the next lowest bid.* [SUF, CR 32, ¶¶94, 100-102] Obviously, therefore, the subsistence pay provisions of the so-called "collusive labor agreement" did not and

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[9]By the time the NLRB case was finally decided in 1984, CES was out of business and it never paid any more subsistence. [SUF, CR32, ¶8, 56, 69]

could not serve as an "entry barrier" to CES moving into the Palm Springs market.[10]

As for the *respondents who were not parties to the SS NECA Local 440 collective bargaining agreement,* CES produced no evidence that any of them did anything which even arguably violated the antitrust laws or was otherwise illegal. Nor could anything they did have caused CES to be driven out of business in Palm Springs or anywhere else.

The Pension Trust Fund was not a party to the SS NECA/Local 440 Collective Bargaining Agreement and had no connection with the subsistence pay dispute between CES and Local 440. CES's claim that the Pension Trust Fund acted to enforce those provisions of the agreement against CES is *utterly false*. The evidence conclusively proved that the Pension Trust Fund did nothing more than carry out its fiduciary obligation by attempting to collect *delinquent employee benefit contributions* which CES owed to the trust under *both* the LA NECA/Local 11 and Southern Sierras NECA/Local 440 collective bargaining agreements. [SUF, CR 32, ¶¶57-79] Indeed, CES *admitted* that in early 1983 it became delinquent in making its required fringe benefit contributions for its employees, and that it still owed money to the Pension Trust Fund at the time the IRS seized all of CES's assets on May 6, 1983.

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[10]It should be remembered that under the agreement, CES only would have had to pay subsistence on jobs in the Palm Springs area if the work commenced before its local office finally satisfied the 90 day minimum requirement in January, 1982. CES never produced a shred of competent evidence to prove that it was prevented from getting any other job during that brief period (or at any other time) as the result of being underbid by a local contractor, with subsistence pay making the difference.

[CR 1. ¶21(w); SUF, CR 32, ¶¶62, 64] In support of its motion for summary judgment on the merits, the Pension Trust Fund produced uncontroverted evidence that as of August 2, 1983 (after CES had ceased doing business) CES owed $57,617.18 in delinquent fringe benefit contributions. [SUF, CR 32, ¶¶60-63][11]

It is important to note, moreover, that CES's obligation to make pension and other fringe benefit contributions for its employees was not affected in any way by the subsistence pay dispute with Local 440. The subsistence pay constituted supplemental wages, payable directly to the employees who worked on the Indio Hospital job, and such payments did not affect the amount of contributions owed by CES for fringe benefits. The required fringe benefit contributions were based on the number of *hours* worked by employees. Furthermore, the delinquency was attributable to work performed by *all* of CES's employees on *all* of its jobs, most of which were located in Los Angeles County. [SUF, CR 32, ¶¶58, 62, 65, 68]

Respondents, Local 11 and LA NECA, are referred to in the petition as the "Los Angeles County counterparts" to Local 440 and SS NECA. (Petition, p. 4) That term is meaningless. No facts exist which connect Local 11 or LA NECA to the Southern Sierras NECA/Local 440 collective bargaining agreement or the events which occurred in Riverside County. CES's sole

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[11]Unquestionably, the trustees of an employee benefit trust fund governed by ERISA and the LMRA "have an obligation to enforce the terms of the collective bargaining agreement regarding employee fund contributions against the employer 'for the sole benefit of the beneficiaries of the fund.' " *Hawkins v. Bennett*, 704 F.2d 1157, 1159 n. 1 (9th Cir. 1983); *Huge v. Old Home Manor, Inc.*, 419 F.Supp. 1019, 1021 (W.D. Pa. 1976).

basis for naming Local 11 as a defendant was that it sought to enforce the fringe benefit provisions of *its own collective bargaining agreement* against CES, when CES admittedly became delinquent in making such contributions. [SUF, CR 32, ¶¶62, 63, 65, 66] LA NECA was included as a defendant solely because its representatives sat on the Labor-Management Committee which upheld various grievances against CES, brought by Local 11 *under the LA County agreement.* [CR 1, ¶¶21(w), (x)]

CES's sole basis for suing Gomes and Thorson and their corporations—referred to in the petition as "indigenous local contractors" (Petition, p. 4)—was that they served as management representatives on the Labor-Management Committee which upheld Local 440's position on the Palm Springs office timing dispute. In so doing, however, they were simply performing their duty to act as *independent arbitrators.*[12] Moreover, as previously shown, the ALJ and NLRB expressly found that the Committee had agreed with the union *in good faith,* and that its decision was *correct*[13]

In light of the foregoing facts, it is positively ludicrous for CES to assert in its petition to this Court that any

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[12]This method of dispute resolution is common in labor agreements and favored by the courts. Since the management and union representatives on the committee serve as independent arbitrators, they have no duty to support their respective sides in the controversy. See *Early v. Eastern Transfer,* 699 F.2d 552, 559-560 (1st Cir. 1983); *Goodwin v. Teamsters Local 150,* 113 LRRM 3029, 3032 (E.D. Cal. 1982).

[13]The NLRB's decision is binding on CES in this action under the doctrine of collateral estoppel. *Glaziers & Glassworkers v. Custom Auto Glass Distributors,* 689 F.2d 1339, 1341 (9th Cir. 1982); *Paramount Transport Systems v. Chauffeurs, Etc. Local 150,* 436 F.2d 1064 (9th Cir. 1971).

of the respondents, let alone all of them, engaged in illegal conduct under the antitrust laws, which "drove CES not only out of the Palm Springs electrical contracting market but completely out of business." [Petition, p. 4] CES's President, Gus Shouse, admitted in his deposition that when the *IRS permanently closed CES down* on May 6, 1983, it was still performing work on the Indio Hospital job. At that time, the general contractor removed CES from the job because the IRS seized all of CES's tools and other assets so that it could no longer perform its contract. This action was taken by the IRS, with the cooperation of the SBA, because CES owed approximately *$100,000* to the IRS for *unpaid withholding taxes* and *$427,044.20* to the SBA on a *defaulted SBA guaranteed loan.* [SUF, CR 32, ¶¶8, 69-71] In light of those debts, the small amounts involved in disputed subsistence pay and delinquent fringe benefits were inconsequential and clearly could not have been the cause of CES's financial demise.

REASONS WHY THE PETITION SHOULD BE DENIED

I.

THE NINTH CIRCUIT'S CONSTRUCTION OF RULE 17(b) IS NEITHER IN CONFLICT WITH OTHER CIRCUITS NOR PRECLUDED BY THE SUPREMACY CLAUSE OR POLICY BEHIND THE SHERMAN ACT.

The first question presented in the petition is unfairly slanted from the start, in that it asks if FRCP 17(b) requires a federal court "to adopt a state rule of corporate capacity when to do so permits antitrust violators to use their own illegal conduct to shield them from Sherman Act liability, frustrating the basic enforcement goals of the antitrust laws?" As we have shown, the

actual facts of this case do not properly raise that question at all. Erroneous factual premises also infect CES's discussion of this question in the "Reasons For Granting Review," wherein it is argued that the Court of Appeals' "construction" of Rule 17(b) "permits state rules of procedure to frustrate the substantive policy of the Sherman Act" and, therefore, that such construction conflicts with decisions of other circuits and is precluded by "the supremacy clause" (Article VI of the Constitution). [Petition, pp. 6-12] In addition to being factually unfounded, all of these arguments are so lacking in legal support as to be utterly frivolous.

A. There Is No Conflict With Other Federal Decisions.

Although the heading to CES's first argument asserts that the Court of Appeals' construction of Rule 17(b) is "in conflict with the decisions of other circuits," CES cites no conflicting decisions. Instead, CES merely *argues* that the "fairness" and "logic" behind Rule 17(b) apply only when federal jurisdiction rests on diversity of citizenship, without citing any authority which would support that position. [Petition, pp. 6-7]

Of course, the plain language of the Rule itself—that is, the second sentence, which is the only provision pertinent to corporations—makes no distinction between diversity of citizenship and federal question jurisdic-

tion.[14] Moreover, its application was plainly intended to be *mandatory*: "The capacity of a corporation to sue or be sued *shall* be determined by the law under which it was organized." (Emphasis added)

Furthermore, numerous cases have recognized that Rule 17(b) mandates that the capacity of a corporation to sue or be sued in federal court must be determined under the law of the state of incorporation, *even when federal claims or rights are involved.* See *R.V. McGinnis Theaters v. Video Indep. Theaters, Inc.*, 386 F.2d 592, 593-595 (10th Cir. 1967), *cert. den.*, 390 U.S. 1014 (1968); *Moore v. Matthews' Book Co.*, 597 F.2d 645, 646-647 (8th Cir. 1979); *Mather Construction Co. v. United States*, 475 F.2 1152, 1154-1155 (Ct. Cl. 1973); *U.S. v. 2.61 Acres of Land*, 791 F.2d 666, 668 (9th Cir. 1985); *Levin Metals Corp. v. Parr-Richmond Terminal Co.*, 817 F.2d 1448, 1451 (9th Cir. 1987). All of these cases, except *Mather Construction Co.*, were cited in the Ninth Circuit's opinion herein. Indeed, the court expressly *followed Moore* and *McGinnis*, both of which held that a corporate plaintiff lacked capacity to maintain an *antitrust* action under Rule 17(b) because of the loss of its power to sue under state law. In *McGinnis*, as here, the antitrust plaintiff's lack of capacity was caused

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[14]In contrast, the *third* sentence of Rule 17(b) expressly does make such a distinction: "In all *other* cases [i.e., other than with respect to an individual (first sentence) or corporation (second sentence)] capacity to sue or be sued shall be determined by the law of the state in which the district court is held, *except* (1) that a partnership or other unincorporated association, which has no such capacity by the law of such state, may sue or be sued in its common name *for the purpose of enforcing for or against it a substantive right existing under the constitution or laws of the United States. . . .*" (Emphasis added)

by the suspension of its charter by the state of its incorporation, for non payment of taxes.

The petition fails even to mention these cases, which the Court of Appeals considered to be *controlling and contrary to the very argument CES is now making to this Court.* One would think that CES would make some effort either to distinguish them or suggest a reason why they were wrongly decided. But CES simply ignores them as if they did not exist, and says "[i]t is far from certain that the Rule was intended to be applied at all in a federal question lawsuit," citing two treatises for the proposition that "[l]eading commentators on the Federal Rules appear to treat Rule 17(b)'s directive as applying only in those actions brought under a federal court's diversity powers." [Petition, p. 9]

CES has completely misinterpreted these two "authorities." The short statements quoted in the petition are taken completely out of context and do not mean what CES is suggesting. Neither commentator was talking about the capacity of a corporation to sue under the *law of the state of its organization.* Rather, both were discussing the fact that there is an *additional* restriction or limitation on a corporation's ability to sue in federal court in diversity cases, based on this Court's decisions in *Angel v. Bullington,* 330 U.S. 183 (1947)

and *Woods v. Interstate Realty Co.*, 337 U.S. 535 (1949).[15]

Thus, in 3A *Moore's Federal Practice*, §17.21, pp. 17-172 to 17-174, it was observed that *Angel* and *Woods* have the effect of *modifying* Rule 17(b), in that it is *not enough* in a diversity case for a *foreign corporation* to have technical capacity under that Rule—i.e., the right to sue under the law of the state of its *own* incorporation. The corporation *also* must be able to sue under the law of the *forum* state, and "[a]ny valid law closing its courts to a foreign corporation which is not qualified to do business in the state must, therefore, be given effect in the federal courts of such state in a case based solely on diversity or alienage jurisdiction." *Id.* In proper context, then, the sentence from *Moore's* quoted by petitioner simply states the obvious limitation on this additional restriction, that it should not apply where the foreign corporation's lawsuit is based on federal substantive law.

The same distinction is made in 6 *Wright & Miller, Federal Practice and Procedure*, §1561, pp. 734-735, which states "[i]n addition to satisfying subdivision (b) [of Rule 17], the corporation also must have a right

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[15]The petition (pp. 6-7) discusses *Angel* and *Woods* but misinterprets them just as it does the two treatises. *Angel* did not involve the question of capacity at all. This Court held that when a federal court's jurisdiction rests on diversity of citizenship, the court is, in effect, only another court of the state in which it sits. Hence, the court's power is limited and it may not entertain suits that could not be brought in the state court. Based on *Angel*, this Court held in *Woods* that a foreign corporation is barred from bringing a diversity case in federal court if the law of the *forum state* would preclude the foreign corporation from suing in the state's courts because of the failure to properly qualify to do business in the state.

that is enforceable in the courts of the forum state"; but "if subject matter jurisdiction is not based upon diversity of citizenship, the federal court need not apply forum state restrictions on a corporation's ability to sue."

Nothing in *Wright & Miller, Moore's,* or the cases they cite, supports the very different proposition urged by CES, that in a non diversity case a federal court may disregard the express mandate of Rule 17(b) and entertain the suit even though the corporate plaintiff lacks capacity to sue under the law of the state in which it was organized.

Similarly wide of the mark is CES's argument that Rule 17(b) should be disregarded in the instant case under the rationale of several cases involving prisoners who were permitted to sue for violations of their federal civil rights by the state that imprisoned them, notwithstanding the fact that by virtue of such imprisonment they could not sue in the courts of that state.[16] But the policy reasons which justified that limited deviation from the *first* sentence of Rule 17(b) plainly have no application to the capacity requirement for corporations stated in the *second* sentence of the Rule. An "individual' is, of course, a natural person whose creation and existence do not stem from the law of the state of his or her domicile. Moreover, such individual continues to be a "natural person" and "citizen" of the United States within the meaning of the civil rights laws, even while in prison.

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[16]The cases referred to are cited on page 10 of the petition. Only two are appellate decisions, however: *Weller v. Dixon,* 314 F.2d 598 (9th Cir. 1963), *cert. den.,* 375 U.S. 845 (1963); *Almond v. Kent,* 459 F.2d 200 (4th Cir. 1972).

In contrast, as the Court of Appeals observed in this case, "corporations are creatures of state law" (citing *Cort v. Ash*, 422 U.S. 66, 84 (1975)). [Petition, Appendix B, p. App. 35] Indeed, as this Court recognized more than 50 years ago in *Chicago Title & Trust Co. v. Forty-One Thirty-Six Wilcox Building Corp.*, 302 U.S. 120 (1937):

> "The decisions of this court are all to the effect that a private corporation in this country can exist only under the express law of the state or sovereignty by which it was created. Its dissolution puts an end to its existence, the result of which may be likened to the death of a natural person. There must be some statutory authority for the prolongation of its life, even for litigation purposes. (Citation)" *Id.* at 124-125
>
> . . . . . .
>
> "The power to take the long step of putting an end to the corporate existence of a state-created corporation without limitation, connotes the power to take the shorter one of putting an end to it with such limitations as the legislature sees fit to annex. (Citation) And since the federal government is powerless to resurrect a corporation which the state has put out of existence for all purposes, the conclusion seems inevitable that if the state attach qualifications to its sentence of extinction, nothing can be added to or taken from these qualifications by federal authority." *Id.* at 128.

Rule 17(b), as applied to corporations, rests squarely on this fundamental precept of corporate existence. A corporation which has ceased to exist under the law

of the state of its incorporation cannot be considered to exist for the purpose of bringing suit in federal court, regardless of the alleged basis for federal jurisdiction. Indeed, in *R.V. McGinnis Theaters & Pay T.V. v. Video Indep. Theaters, supra,* the Tenth Circuit based its holding squarely on *Chicago Title & Trust Co.,* as well as Rule 17(b), when it dismissed the suspended corporate plaintiff's antitrust suit.

None of the other cases cited by CES is even remotely relevant to the corporate capacity issue presented here. Accordingly, CES has not demonstrated that the decision below is in conflict with any other federal decision, and that alleged ground for certiorari does not exist.

B. No Important Federal Question Is Presented.

Equally lacking in merit is CES's contention that the Ninth Circuit's construction of Rule 17(b) is precluded by the supremacy clause and frustrates antitrust policy. This entire argument rests on faulty factual and legal premises, as we have demonstrated. Rule 17(b) establishes a *federal* rule of capacity for corporations and cannot violate the supremacy clause. It merely adopts the law of the state of incorporation as the federal rule because a corporation exists only by the grace of state law.

Nor was antitrust policy frustrated by the result below. CES was prevented from pursuing its antitrust claim because it allowed its own corporate existence to lapse, just as was true in *McGinnis, supra.* CES's contention that the result here had the effect of rewarding respondents for being successful with their alleged anti-competitive conduct is pure nonsense. Even if respondents had driven CES out of business as alleged, CES

still could very easily have maintained its corporate life for the purpose of bringing this action, without having to pay the taxes it says it was rendered incapable of paying, by simply making a timely application for revivor under Revenue and Taxation Code Section 23305b. The door to the federal courts became permanently closed only because CES foolishly ignored the defense of lack of capacity alleged by respondents, and slept on its rights until it was too late.

Accordingly, this case not only was correctly decided it turned on its own peculiar facts which are highly unlikely to occur with any frequency. Presumably, other corporate plaintiffs with antitrust claims will be more prudent about taking the minimal steps required to preserve their capacity to sue. Nothing presented here requires the intervention of this Court to protect "the substantive goals of antitrust law."

II.

THERE WAS NO VIOLATION OF DUE PROCESS.

By its second Question Presented, CES argues that it was denied its constitutional right of access to federal court, in violation of the due process clauses of the Fifth and Fourteenth Amendments. [Petition, pp. 12-14] It should be noted, however, that the Court of Appeals *declined to address* CES's due process claim on the ground that it had not been properly raised in the trial court. [Petition, Appendix B, p. App. 40] For the same reason, it should be disregarded by this Court.

In any event, the claim is patently lacking in merit. Contrary to CES's claim, California law does not "bar a class of litigants from seeking a federal remedy for violation of their federal rights." [Petition, p. 12]

California Revenue and Taxation Code Section 23305b provided CES with the means of preserving its capacity to pursue its antitrust claims. CES was barred from court by its own negligence.

III.

THE COURT OF APPEALS CORRECTLY DECIDED THAT THE STATUTE OF LIMITATIONS WAS NOT TOLLED BY THE NLRB PROCEEDING.

CES's last Question Presented is based on its argument that the statute of limitations on the antitrust claims should have been tolled during the NLRB litigation between CES and Local 440. [Petition, pp. 15-17] That argument was expressly and correctly rejected by the Court of Appeals. [Petition, pp. App. 39-40]

It is true that respondents contend the subsistence pay provisions of the Southern Sierras NECA/Local 440 collective bargaining agreement fall squarely within the so-called non statutory labor exemption from the antitrust laws. This follows because, (1) the claimed restraint on trade affected only signatories to the collective bargaining agreement; (2) it involved a "mandatory subject of bargaining" under the NLRA (wages); and (3) the agreement was the product of bona fide arms' length bargaining. *Continental Maritime v. Pacific Coast Metal Trades,* 817 F.2d 1391, 1393 (9th Cir. 1987); *Mackey v. National Football League,* 543 F.2d 606, 614 (8th Cir. 1976). It is not true, however, that the NLRB had "primary jurisdiction" over the issue of whether the subsistence pay provisions constituted a mandatory subject of bargaining. More importantly, the NLRB certainly did not have primary jurisdiction over the question of whether the nonstatutory labor exemption should be applied here. As the Court of

Appeals said, the courts are perfectly capable of deciding that question by themselves. [Pet., p. App. 40]

Hence, there was no need to stay the bringing of the antitrust suit while the NLRB case was pending. Indeed, as we have seen, CES brought the instant action *despite* the fact that the NLRB had determined that the disputed pay provisions constituted a mandatory subject of bargaining.

For these reasons, the Court of Appeal's decision on this issue is not in conflict with this Court's decision in *Ricci v. Chicago Mercantile Exchange*, 409 U.S. 289 (1973). The factors which supported a stay of the lawsuit in favor of administrative action in that case are not present here.

CONCLUSION

For the foregoing reasons, the petition for writ of certiorari should be denied.

Respectfully submitted,

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APPENDIX

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UNITED STATES DISTRICT COURT

CENTRAL DISTRICT OF CALIFORNIA

COMMUNITY ELECTRIC SERVICE OF LOS ANGELES, INC., Plaintiff,	)	CASE CV 86-0254 RSWL (MCx)

APPENDIX A

vs.	)	ORDER
NATIONAL ELECTRICAL CONTRACTORS ASSOCIATION, INC., a corporation, etc., et al.,	)	GRANTING SUMMARY JUDGMENT
Defendants.	)	

This matter came regularly before the Court, the Honorable Ronald S.W. Lew, United States District Judge, presiding, on July 27, 1987, pursuant to an Order to Show Cause issued by the Court on June 15, 1987. All parties appeared and were represented by counsel of record.

The Court's Order to Show Cause was issued at the conclusion of a Status Conference held on June 15, 1987, which Status Conference had been requested by the defendants. Defendants requested said Status Conference for the purpose of raising certain issues concerning the claimed lack of capacity of the plaintiff to bring and pursue this action and the claimed expiration of the statute of limitations on plaintiff's claims by reason of such lack of capacity. The Court's Order to Show Cause afforded the plaintiff and defendants an opportunity to present their evidence and arguments concerning those issues and all of the parties submitted papers on the subject.

The Court has determined that the issues presented by the papers submitted by the parties should be considered as the equivalent of a motion for summary judgment by the defendants under Rule 56(b) of the Federal Rules of Civil Procedure, and opposition thereto by the plaintiff. Accordingly, the Court has given full consideration to the papers submitted by the parties under the standards prescribed for such motions under Rule 56 and, after hearing the arguments of counsel and being fully advised, IT IS HEREBY ORDERED as follows:

1. The Court finds that the following facts are uncontested:

a. The latest date on which the statute of limitations commenced to run with respect to any of plaintiff's claims asserted in this action is May 6, 1983, the date on which plaintiff ceased doing business allegedly as the result of the defendants' conduct.

b. Plaintiff's corporate powers, rights and privileges were suspended by the California Franchise Tax Board pursuant to the provisions of Sections 23301 and 23302 of the California Revenue and Taxation Code on July 1, 1983.

c. The Complaint in the instant action was filed by plaintiff on January 13, 1986, at which time plaintiff's corporate powers, rights and privileges remained suspended.

d. Unless tolled by the filing of the Complaint or for some other reason, the four year statute of limitations applicable to plaintiff's antitrust claims (15 U.S.C. §15b) expired on May 6, 1987, and the various statute of limitations applicable to all of plaintiff's other claims expired either on or before that date.

e. Following the suspension of its corporate powers, rights and privileges on July 1, 1983, such suspension remained in effect at all times until June 8, 1987. On June 8, 1987, effective that date, the California Franchise Tax Board issued a Certificate of Relief from Suspension or Forfeiture which revived plaintiff's corporate powers, rights and

privileges, with such revivor limited to court action only.

2. The Court concludes that the governing rule of law is that the revivor of plaintiff's corporate powers, rights and privileges on June 8, 1987 was not retroactive for purposes of preventing the statute of limitations from continuing to run on all of plaintiff's claims in this action during the period of plaintiff's suspension. This rule is mandated by the decision of the California Court of Appeal in the case of *Welco Construction, Inc. v. Modulux, Inc.* (1975) 47 Cal.App.3d 69, and California Revenue and Taxation Code Section 23305a which was interpreted by the court in that decision. The Court has determined that the *Welco* decision represents the law of California and is applicable and controlling in this action by virtue of Rule 17(b) of the Federal Rules of Civil Procedure.

3. The Court further concludes that the statute of limitations was not tolled with respect to any of plaintiff's claims asserted in this action during the pendency of the National Labor Relations Board proceeding between plaintiff and defendant International Brotherhood of Electrical Workers Local Union No. 440, as contended by plaintiff.

4. By reason of the foregoing, each of the claims asserted by plaintiff in this action became barred by the statute of limitations applicable thereto on May 6, 1987, if not sooner. Accordingly, there is no genuine issue as to any material fact and defendants are entitled to a judgment as a matter of law pursuant to Federal Rule of Civil Procedure 56. Summary judgment is hereby granted to defendants, dismissing plaintiff's complaint in its entirety.

Dated: 8-4-87

RONALD S. W. LEW

RONALD S.W. LEW
UNITED STATES DISTRICT
COURT JUDGE

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UNITED STATES DISTRICT COURT
CENTRAL DISTRICT OF CALIFORNIA

COMMUNITY ELECTRIC SERVICE OF LOS ANGELES, INC., Plaintiff, vs.	CASE CV 86-0254 RSWL (MCx) JUDGMENT

APPENDIX B

NATIONAL ELECTRICAL CONTRACTORS ASSOCIATION, INC., a corporation, etc., et al.,
Defendants.

This matter came regularly before the Court, the Honorable Ronald S.W. Lew, United States District Judge, presiding, on July 27, 1987, pursuant to an Order to Show Cause issued by the Court on June 15, 1987. All parties appeared and were represented by counsel of record. The Court, after being fully advised and having granted summary judgment in favor of defendants and against plaintiff pursuant to Federal Rule of Civil Procedure 56, and having now executed a separate, formal written Order Granting Summary Judgment setting forth the reasons therefor,

IT IS ORDERED, ADJUDGED AND DECREED:

1. That defendants, National Electrical Contractors Association, Inc., Southern California IBEW-NECA Pension Trust Fund, Southern Sierras Chapter, National Electrical Contractors Association, Los Angeles County Chapter, National Electrical Contractors Association, John Gomes, Individually and dba Industrial Electric, Inc., Dennis Thorson, Individually and dba Thorson Electric, Inc., International Brotherhood of Electrical Workers, AFL-CIO, International Brotherhood of Electrical Workers Local Union No. 11 and International Brotherhood of Electrical Workers Local Union No. 440, and each of them, shall have judgment in their favor and against plaintiff, Community Electric Service of Los Angeles, Inc., on each and all of the claims asserted in plaintiff's complaint herein on the ground that each of said claims is barred by the applicable statute of limitations. Said complaint is hereby dismissed in its entirety and plaintiff shall recover nothing thereunder.

2. Defendants shall recover costs from plaintiff as taxed by the Clerk of the Court. ~~in the amount of~~ $ RSWL

Dated: 8-4-87

RONALD S. W. LEW

RONALD S.W. LEW
UNITED STATES DISTRICT
COURT JUDGE

SUBMITTED BY:

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REVENUE AND TAXATION CODE

Section 23301. Delinquency; suspension or forfeiture of corporate powers, etc.

Except for the purposes of filing an application for exempt status or amending the articles of incorporation as necessary either to perfect that application or to set forth a new name, the corporate powers, rights and privileges of a domestic taxpayer, may be suspended, and the exercise of the corporate powers, rights and privileges of a foreign taxpayer in this state may be forfeited if any of the following conditions occur:

(a) If any tax, penalty or interest, or any portion thereof, which is due and payable either at the time the return is required to be filed, or on or before the 15th day of the ninth month following the close of the income year, is not paid on or before 6 p.m. on the last day of the 12th month after the close of the income year, or

(b) If any tax, penalty or interest, or any portion thereof, due and payable upon notice and demand from the Franchise Tax Board, or due and payable under Section 25936, is not paid on or before 6 o'clock p.m. on the last day of the 11th month following the due date of said tax.

Section 23303. Notice of delinquency to Secretary of State; effective date of suspension or forfeiture; certificate as prima facie evidence.

The Franchise Tax Board shall transmit the names of taxpayers to the Secretary of State as to which the suspension or forfeiture provisions of Section 23301, 23301.5 or 23775 are or become applicable, and the

suspension or forfeiture therein provided for shall thereupon become effective and the certificate of the Secretary of State shall be prima facie evidence of such suspension or forfeiture.

Section 23305. Relief from suspension or forfeiture; application; payment; certificate of revivor.

Any taxpayer which has suffered the suspension or forfeiture provided for in Section 23301 or Section 23301.5 may be relieved therefrom upon making application therefor in writing to the Franchise Tax Board and upon payment of the tax and the interest and penalties for nonpayment of which the suspension or forfeiture occurred, together with all other taxes, deficiencies, interest and penalties due under this part, and upon the issuance by the Franchise Tax Board of a certificate of revivor. Application for such certificate on behalf of any domestic bank or corporation which has suffered such suspension may be made by any stockholder or creditor, by a majority of the surviving trustees or directors thereof, by any officer, or by any other person who has interest in the relief from suspension. Application for such certificate may be made by any foreign bank or corporation which has suffered such forfeiture, by any stockholder or creditor thereof, by an officer, or by any other person who has interest in the relief from forfeiture.

Section 23305a. Certificate of revivor; clearance of corporate name; reinstatement; prima facie evidence.

Before such certificate of revivor is issues by the Franchise Tax Board, it shall obtain from the Secretary of State an endorsement upon such application of the fact that the name of the taxpayer then meets the

requirements of subdivision (b) of Section 201 of the Corporations Code in the case of a domestic bank or corporation or of subdivision (b) of Section 2106 of the Corporations Code in the case of a foreign corporation. The reference to amendment of the articles of incorporation to set forth a new name contained in Sections 23301, 23301.5 and 23775 includes in the case of a foreign corporation the filing of an amended statement and designation to set forth its new name or to set forth an assumed name under subdivision (b) of Section 2106 of the Corporations Code. Upon the issuance of such certificate by the Franchise Tax Board the taxpayer therein named shall become reinstated but such reinstatement shall be without prejudice to any action, defense or right which has accrued by reason of the original suspension or forfeiture. The certificate of revivor shall be prima facie evidence of such reinstatement and such certificate may be recorded in the office of the county recorder of any county of this state.

Section 23305b. Revivor of corporation without full payment of taxes, penalty and interest.

Notwithstanding the provisions of Section 23305, the Franchise Tax Board may revive a corporation to good standing without full payment of the taxes, penalties and interest due if it determines that the revivor will improve the prospects for collection of the full amount due. Such revivor may be limited as to time or may limit the functions the revived corporation can perform, or both. The corporate powers, rights and privileges may again be suspended or forfeited if the Franchise Tax Board determines that the prospects for collection of the full amount due have not been improved by the revivor of the corporation.

PROOF OF SERVICE BY MAIL

State of California

ss.

County of Los Angeles

I, the undersigned, say: I am and was at all times herein mentioned, a citizen of the United States and a resident of the County of Los Angeles, over the age of eighteen (18) years and not a party to the within action or proceeding; that my business address is 11333 Iowa Avenue, Los Angeles, California 90025; that on September 8, 1989, I served the within *Respondents' Brief in Opposition* in said action or proceeding by depositing true copies thereof, enclosed in a sealed envelope with postage thereon fully prepaid, in the United States mail at Los Angeles, California, addressed as follows:

Clerk, United States
Supreme Court
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I declare under penalty of perjury that the foregoing is true and correct. Executed on September 8, 1989, at Los Angeles, California.

Betty J. Malloy
(Original signed)